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In the Supreme Court of the United States

October Term, 1984

ARTHUR S. LANGENDERFER, INC., and
NORTHERN OHIO ASPHALT PAVING CO.,
Petitioners,

vs.

S. E. JOHNSON COMPANY,
THE OHIO ENGINEERING COMPANY,
FRED R. CREAGER & SONS, INC.,
MATCO, INC.,
OAMCO, INC.,
C. P. CALAWAY, INC.,
THE MAUMEE STONE COMPANY,
THE MICHIGAN STONE COMPANY,
WOLCOTTVILLE SAND & GRAVEL CORP. and
J. T. KIRKBY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. Should an illegal monopolist's practice of limit pricing (marginally above its own total cost, but 5-10% below all its competitors' costs) be held legal, as a matter of law, despite direct evidence that the intent and effect was to eliminate competition and maintain the monopoly?

II. Are corporations engaged in paving interstate highways engaged "in commerce" within the meaning of section 7 of the Clayton Act (15 U.S.C. §18)?

III. Is divestiture available in a private antitrust action as remedial injunctive relief against an illegal monopoly under Section 16 of the Clayton Act (15 U.S.C. §26)?

RULE 28.1 STATEMENT

Material Suppliers of Northwest Ohio, Inc., an Ohio corporation, is a non-wholly owned subsidiary of Northern Ohio Asphalt Paving Co. MacRitchie Materials, Inc., the proposed intervenor below, is an affiliate of Petitioners.

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9 WRIGHT & MILLER, FED. PRAC. AND PROC. §2511, p. 521 12

The petitioners, Arthur S. Langenderfer, Inc. and Northern Ohio Asphalt Paving Company, respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered on March 15, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 729 F.2d 1050 and appears in the Appendix hereto at A1 to A25.[1] The district court rendered unreported written opinions appended hereto denying respondents' motions for judgment n.o.v. or a new trial (A26) and entered a Final Judgment for Injunctive Relief (A35).

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 1984; A51. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 3, 1984; A53. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This suit involved applications of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, and Sections 7 and 16 of the Clayton Act, 15 U.S.C. §§18, 26. These provisions appear at A55 to A57.

STATEMENT OF THE CASE

The petitioners ("Langenderfer") proved at trial that the respondents ("Johnson") restrained trade, monopolized and attempted to monopolize asphalt paving

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1. Citations to the Appendix to this petition are in the above form. The Joint Appendix in the Court of Appeals is cited as "AI, II or III" plus page references. Exhibit references are PX for plaintiffs (petitioners) and DX for defendants (respondents). Emphasis is petitioners' unless otherwise noted.

work on Ohio Turnpike and State highway jobs in a thirteen county area of Northwestern Ohio between 1972 and 1978 eventually driving petitioners out of business. This petition seeks review of the majority decision (2-1) of the Sixth Circuit adverse to petitioners holding that: (1) despite substantial evidence that the respondents' "acquisitions [had] significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure," and (2) despite other direct evidence that the monopolist "intended to eliminate competition and dominate the market," the monopolist, *as a matter of law,* could not be liable for predatory pricing "without some evidence that [it] has charged prices below its total cost for the product sold." 729 F.2d at 1054, 1058; A5-A6, A14-A15. The effect of this holding (as observed by the dissenting judge) is that: "irrespective of any direct evidence of intent to predatorily price, if [a monopolist] can prove objectively that his prices were above his average total costs, his conduct is *per se* legal." To the dissenting judge, the majority's holding seemed "to create a 'free zone' in which monopolists can exploit their power without fear of Sherman Act scrutiny or sanctions." (*Id* at 1061; A21). Review is also sought of the majority's holding that the respondents' acquisitions of four asphalt paving competitors engaged in the construction and repair of interstate highways were not, *as a matter of law,* a violation of Clayton Act §7 because they were not engaged "in commerce." Based on these holdings, and the trial judge's failure to give special interrogatories with the general verdict, the majority vacated the district court judgments awarding treble damages and affording injunctive relief against respondents' monopolistic practices and remanded this eight-year-old case for a new trial. The majority also held, *as a matter of law,* that divestiture is not available as an injunctive remedy against a monopolist under Clayton Act §16 in a private antitrust action.

The Parties

Petitioners, Arthur S. Langenderfer, Inc. ("Langenderfer") and Northern Ohio Asphalt Paving Co. ("NOAP"), are Ohio corporations based in Toledo. They are owned and operated by Burton R. MacRitchie and his sons. Langenderfer was in the road paving business for 65 years until driven out by the respondents in 1978 (AI 51, 98-104). NOAP produced the hot mix asphalt which Langenderfer used in its road contracting business. When Langenderfer was still in business, NOAP had four hot mix plants in Northwestern Ohio, but by the time of trial, had only two (AI 49-54).

All the respondent companies are commonly owned and controlled by the heirs of Sherman E. Johnson and have been managed since 1957 by respondent John T. ("Ted") Kirkby who is the chief executive officer and operating head of said companies (AI 551-553, 555-557, 582-584). The principal respondent companies are: S. E. Johnson, Ohio Engineering and Fred Creager & Sons, Inc. (asphalt pavers); Matco and OAMCO, which supply hot mix asphalt to the paving companies; Maumee Stone, Michigan Stone and Wolcottville S&G, which supply stone or sand to Matco, OAMCO and the respondent pavers; and C. P. Calaway, a bridge building subsidiary of S. E. Johnson. About two months before trial, respondents also acquired Union Quarries Co., a fully-integrated competitor, for $3.5 million cash (AII 629-31; PX 3).

The Asphalt Paving Market

Langenderfer and Johnson were competitors for many years in the business of supplying asphaltic concrete[2] ("hot mix"), stone and sand for highway construction and repair

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2. Asphaltic concrete laid on highways consists of about 60% crushed limestone, 40% sand and 6% liquid asphalt which evaporates in the hot mix process. Stone and sand are also used as base courses on new roads.

purposes in Northwestern Ohio.[3] This work is administered and paid for by governmental bodies which invite competitive bids on specifications from paving contractors who are required to supply all the necessary highway construction materials (hot mix, stone and sand), labor and supervision at per-unit prices specified in the winning bid. The larger volume work is performed by prequalified contractors on Federal and State highway jobs which are closely specified and administered by the Ohio Department of Transportation ("ODOT") and the Ohio Turnpike Commission ("OTC") with substantial use of Federal funds (AI 78-86). The costs of the essential raw (stone and sand) or processed materials (hot mix) and hauling them to the job site is the major part of the expense in performing these contracts (AII 626-627). To minimize the expense, the paving contractor normally attempts to purchase his materials from the quarry or hot mix plant closest to the job site. The practical effective radius of a hot mix plant is about 25-30 miles because of the haul cost involved and the specified temperatures at which the product must be delivered. Respondents, through a series of acquisitions, now control seven quarries, two sand pits and fourteen hot mix plants strategically located throughout the area and are obviously the dominant factor in this regional industry. Petitioners were respondents' principal competitors for many years until forced out of the asphalt paving business in 1978 (AI 51-54, 98-104; AIII 1, PX 3).

Respondents' Monopolistic Acts and Their Anti-Competitive Effects

By 1957, after its founder died, Johnson was already the largest asphalt paver in Northwestern Ohio, owning

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3. For purposes of appeal, the parties agreed that the relevant product and geographical market was that advanced by petitioners at trial, i.e., asphalt paving highway projects awarded by OTC and ODOT in the thirteen-county area of Northwestern Ohio where petitioners and respondents competed.

two major quarries and three hot mix plants supplying the area (AII 982). In that year, Mr. Kirkby, a C.P.A. and economics major, became the operating head of the respondent companies and started an ambitious acquisition program, acquiring twelve different companies over 15 years. This included vertical and horizontal acquisitions of numerous quarries, sand pits and paving competitors under non-compete arrangements in the face of a shrinking market.[4] Both the trial court and the Sixth Circuit noted the specific intent to monopolize. The trial court stated: "The trial transcript is replete with evidence from which the jury could have concluded that defendants had the specific intent to monopolize." (A28-29). There were also recurring episodes of threats, coercion and exclusionary conduct by the respondents and particularly by Ted Kirkby, their chief executive officer which the Sixth Circuit capsulized as follows:

> "Substantial evidence indicated that Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market. In addition to the noncompetition agreements previously mentioned, there was considerable testimony that Kirkby or his agents had threatened or coerced several smaller competitors. Kirkby allegedly told one competitor that if he built an asphalt plant to compete with the Maumee plant, defendants would immediately build a larger facility across the street to drive the competition out of business. Another competitor who planned to build a hot-mix plant was told that defendant would not supply the necessary stone for operation of the

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4. Respondents engaged in an assortment of anticompetitive practices as a result of their acquired market power. These included episodes of exclusive dealing (AII 619-620, AI 389-392), price discrimination (AI 392-393, 472-473, 603-604, 449-452); refusals to deal (AI 126-128, 441-442, 435) tying (AI 436-437), and threats and coercion of other small competitors who were told not to bid state work—that belonged to Johnson and to stick to the smaller projects (AI 340-341, 437-439).

plant. On another occasion, Kirkby allegedly said that he did not like Langenderfer or Miller (another competitor) and wanted to run them out of business." (729 F.2d at 1054; A5-A6).

In its summary of facts, the Sixth Circuit majority opinion recognized (729 F.2d 1053-54; A3-A7) that, through the twelve acquisitions, Johnson grew from two quarries and three hot-mix plants to seven quarries, fourteen hot-mix plants and three sand pits; that the horizontal acquisitions eliminated a noticeable segment of Johnson's ODOT-qualified paving competition and the vertical acquisitions gave respondents a captive supply of stone and sand for asphalt paving jobs; that respondents thus became primary stone suppliers for the remaining asphalt paving competitors who did not own quarries; that petitioners' expert economic testimony supported by statistical data showed "that Johnson's acquisitions significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure"; that Johnson performed 75.8% of all Ohio Turnpike (OTC) work in Northwestern Ohio during 1972-78 and from 51.3% to 82.5% of the Ohio Department of Transportation (ODOT) and OTC work compared with an average of 46.9% for the 1966-71 period; that, as Johnson increased its share of the ever decreasing market, from 1970 to 1978 respondents' annual net profits more than doubled from $1.168 to $2.717 million but its eight smaller ODOT competitors went from a combined net profit of $655,000 to a combined net loss.

In addition to the facts capsulized by the Sixth Circuit above, other evidence at trial showed: that respondents' acquisition of five asphalt paving competitors (doubling its capacity in two years) and their change in bidding practices was in anticipation of a market shrinking by more than one-half (AI 115-116, 128, 587-588); and that from 1970-78 respondents' net worth went steadily up (136%) from $9 million to $21 million and its major competitors

went down 4%. By 1978, respondents' net worth was nine times larger than its closest competitor and three times larger than all its major ODOT competitors combined ($6.7 million); that respondents' sales went from $15 million to $43 million and all competitors from $29 million to $35 million; that respondents' assets were five times larger than its next closest competitor; that, from 1965-78, defendants' combined assets increased 347%, net worth 400%, total revenues 550%, and profit 360% (AII 639-647, PX 108-117). Respondents accounted for 40% of all ODOT/OTC asphalt tonnage produced in Northwest Ohio (AIII 13-14, 17, PX 29, 30).

For ten years, respondents sold stone to their smaller paving competitors at rigid, non-competitive and monopolistic prices—never giving a discount; France Stone Co., the only other significant stone competitor, sold stone at the identical prices after respondents' price lists came out and also never discounted (AI 105-109, AII 743-744; PX 25A-F). Langenderfer's expert economists found that this conduct and market control was anticompetitive and monopolistic and that "monopoly prices are charged by the defendant firm." Further, the economists testified that Johnson's monopoly power in the asphalt paving business gave it the leverage to force France to follow respondents' quarry prices (AII 673-74, 777-78, 788-89). Respondents and France controlled between 56% and 60% of all approved road stone in the relevant market between 1976-78 and 87% in the Toledo area; respondents' quarry operations were four times more profitable than their paving business (AIII 153, PX 145; AII 649). Respondents used their monopolistic stone pricing profits coupled with unnecessarily low asphalt paving bidding to effect a profit squeeze on competitors like Langenderfer who had to buy necessary raw materials from respondents. The economists found this to be predatory conduct which "drove the plaintiff out of the market and . . . weakened the remainder of the firms." (AII 778-781, 783-784).

For the years 1972-78, in the face of the declining market, respondents habitually bid asphalt paving jobs substantially below all their competitors' costs and more than 5% to 10% below the next closest bidder, thereby "leaving money on the table." (AI 128-29, 312-13, 341-42, 354, 422-24, 433-35, 501-503). Johnson customarily bid below cost on specific unit items which it controlled such as stone and asphalt and on two major contracts even admittedly bid below its own total costs (AI 379-87, PX 98, 99). Kirkby said that he bid so low to remain dominant, to keep Langenderfer and Miller from getting any jobs and to keep other competitors from coming into the area (AI 564, AII 617-18). When asked why he bid certain paving jobs at cost or zero profit, Kirkby said under oath he did so "to see just how tough the competition is." (AII 609-10). Respondents bid 80% of all ODOT jobs and year after year won more ODOT highway contracts than any other single contractor in the State (AIII 154, PX 147, AIII 19, PX 37). In the face of this, three small competitors gave up and didn't try to bid against Johnson any more (AI 355, 420-24, 433-35); Modern Construction gave up asphalt paving altogether (AI 500-02); another testified that respondents "bid cheaper than [he] could buy the material" (AI 444); and Langenderfer was driven out after eight years of operating losses. Five major competitors who formerly bid in Northwestern Ohio no longer have plants there and have not bid or taken a job in the last 7 years (AI 95-98, AIII 7, PX 16). It cost Miller $1.5 million to get into the asphalt business after an argument with Kirkby; respondents were bidding below his costs; he didn't buy petitioners' two plants because "we knew damn well we could be run out of business or put out of business if we bought them"; and he subsidized his paving losses with profits from out-of-state excavation work (AI 305-08, 313-14, 328, 331). The trial court found that "[d]efendants' market shares were also a result of their superior vertical integration, i.e., their ownership of stone

and sand pits, which enabled the defendants to bid low on asphalt paving work while charging higher prices to competitors for raw materials." (A41). No new quarries have been opened in the area in twenty years except by respondents (AII 1008-1009).

Petitioners' expert economists testified that the respondents' anticompetitive acquisitions created a monopoly, eliminated actual competition, increased market concentration, prevented potential competition, raised entry barriers, and foreclosed competition by vertical integration; as a result, respondents' monopoly power enabled them to maintain monopolistic stone prices which cross-subsidized profit squeezing and predatory bidding practices and reflected a deliberate, calculated and predatory strategy that drove petitioners out of the market, weakened the remaining competition and inflicted Langenderfer's losses (AII 667-671, 676-679, 765-788).

The Proceedings

Petitioners essentially claimed that respondents combined and conspired to injure and drive them out of business by monopolistic and anticompetitive practices in major asphalt paving work in a thirteen-county area of Northwestern Ohio. After a month's trial, Langenderfer's claims of unreasonable restraint of trade, monopolization, and conspiracy or attempt to monopolize in violation of Sherman Act Sections 1 and 2, and illegal acquisitions in violation of Clayton Act Section 7 were all submitted to the jury. In support of the Sherman Act claims, the court submitted twelve separate alleged monopolistic acts including, among others, anticompetitive acquisitions, monopolistic and discriminatory stone pricing, exclusive dealing, refusals to deal, tying, profit squeezing and predatory bidding. The trial court left it up to the jury to determine by a general verdict whether the compendium of monopolistic and anticompetitive acts taken together amounted to Sherman Act violations.

The jury returned a unanimous verdict of $982,117 in actual damages. The trial court trebled the award to $2,946,351 and also entered judgment for $344,544 in attorneys' fees and costs of $18,559. The trial court also issued injunctive relief prohibiting further acquisitions for ten years and "continuation of those anticompetitive practices clearly shown by the evidence at the March, 1980 trial." The injunction prohibited respondents from below cost bidding on ODOT and OTC contracts; from charging monopolistic or discriminatory prices for the raw materials they controlled; from refusals to deal or tying practices affecting stone, sand or asphalt; and from coercing, threatening or intimidating their competitors (A48-A49, AII 1161). The trial court denied respondents' motions for judgment n.o.v. and a new trial stating that: "The evidence was clearly sufficient to raise a question of fact for the jury as to the existence of monopoly power . . . . [t]he trial transcript is replete with evidence from which the jury could have concluded that the defendants had the specific intent to monopolize." (A28-29, AII 1141).

Although the case below was tried and submitted as a traditional monopoly case, the Sixth Circuit majority focused almost entirely on predatory pricing as the determinative issue.[5] The majority conceded that Langenderfer's substantial evidence showed that (1) respondents' "acquisitions [had] significantly reduced competition and increased market concentration thereby creating a monopolistic market structure" and (2) that respondents "in-

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5. This was the way respondents argued the appeal. Aside from a challenge to damages, the sole Sherman Act issue presented on appeal by respondents was "Whether the defendants violated the antitrust laws by the submission of competitive bids for highway asphalt paving projects in amounts below plaintiffs' costs, where defendants bid above their own costs and consistently made profits." Thus, on appeal, respondents didn't deny they were illegal monopolists, didn't challenge petitioners' evidence on that score, didn't raise any questions about the injunction against their monopolistic practices and didn't assign any error or argue abuse of discretion in the trial court's failure to give special interrogatories..

tended to eliminate competition and dominate the market." Nevertheless, the Sixth Circuit majority held "that, as a matter of law, Sherman Act liability cannot be premised on alleged predatory pricing without some evidence that a defendant has charged prices below its total cost for the product sold." The majority held the trial court should have directed a verdict in favor of respondents on the predatory pricing issue. The Sixth Circuit expressly rejected (729 F.2d at 1056; A11) the Ninth Circuit's contrary rule in *Transamerica Computer Co. v. I.B.M. Corp.*, 698 F.2d 1377, 1387-88 (9th Cir.), *cert. denied*, 104 S.Ct. 370 (1983), which held that "limit" pricing above average total costs may be deemed predatory upon clear and convincing proof of predatory intent.[6] Accordingly, the majority held that a monopolist's limit pricing strategy is *legal per se* regardless of its malicious intent and the fact that it has created the very monopolistic market structure which gives it the leverage to price below its competitors' costs. Dissenting Judge Wilhoit found that (729 F.2d at 1061; A22):

> "Johnson willfully and intentionally used its inordinate market power to acquire and maintain a monopoly. Direct evidence of its intent substantiates this. But more importantly, Johnson's conduct establishes it in my mind beyond all doubt."

The majority of the panel also held that the acquired asphalt paving companies engaged in the construction and repair of interstate highways were not engaged "in commerce" within the meaning of Section 7 of the Clayton Act (15 U.S.C. §18), and a directed verdict in favor of respondents should have been granted. Based on these rulings, and the trial court's failure to submit special interrogatories

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6. In *Transamerica, supra*, the Ninth Circuit defined "limit pricing" as a situation "in which a monopolist sets prices above average total cost but below the short-term profit-maximizing level so as to discourage new entrants and thereby maximize profits over the long run." 698 F.2d at 1387.

to the jury on the twelve specified anticompetitive acts[7] the Sixth Circuit majority vacated the judgments below (including the injunction respondents didn't challenge) and remanded this eight-year-old case for a new trial.

Finally, the majority panel affirmed the trial court's holding that divestiture is not remedial injunctive relief available to a successful private plaintiff against a monopolist under Section 16 of the Clayton Act (15 U.S.C. §26). This ruling conflicts with *NBO Industries Treadway Cos., Inc. v. Brunswick Corp.*, 523 F.2d 262 (3rd Cir. 1975), *vacated on other grounds*, 429 U.S. 477 (1977).

Petitioner's timely petition for rehearing and suggestion of rehearing *en banc* was denied on July 3, 1984.

REASONS FOR GRANTING THE WRIT

The principal reason for granting the writ is to review the Sixth Circuit's majority decision that an illegal monopolist can never, *as a matter of law*, be guilty of predatory pricing without some evidence that it has charged prices below its total cost, regardless of substantial evidence that the monopolist willfully created the monopolistic market structure and direct, unrebutted evidence that it intended to eliminate competition and dominate the market. This extraordinary holding is squarely in conflict with, and expressly rejects, the Ninth Circuit's decision in *Transamerica Computer Co. v. I.B.M. Corp.*, 698 F.2d 1377, 1386-

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7. Federal Rule of Civil Procedure 49(a) states in pertinent part that "The Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to the verdict . . ." Rule 49 is permissive not mandatory and the discretion conferred has been called "unreviewable." 9 WRIGHT & MILLER, FED. PRAC. AND PROC. §2511, p. 521. Respondents never requested special interrogatories going to the twelve specific anticompetitive acts; it was totally within the trial court's discretion; and respondents never claimed it as error or argued it on appeal, which operates as a waiver of the error. *Great Coastal Express, Inc. v. IBTCWH*, 511 F.2d 839 (4th Cir. 1975); *Toth v. Corning Glass Works*, 411 F.2d 912, 914 n.2 (6th Cir. 1969).

88 (9th Cir.), *cert. denied*, 104 S.Ct. 370 (1983), which held that pricing above average total costs may be deemed predatory upon clear and convincing proof of predatory intent. In effect, the instant decision stands for the proposition that direct evidence of predatory motive and intent of a monopolist is irrelevant if he can show his pricing was even marginally above total costs. But the plain fact is that a monopolist, by reason of its volume, will almost invariably have lower per unit costs than its smaller competitors. Thus, the decision is both a blueprint and a license for a monopolist to squeeze out its remaining competition. The Sixth Circuit's creation of such a *legal per se* rule in favor of an illegal monopolist raises an important and far-reaching question of Federal law which is also in conflict with long-standing decisions of this Court and the sound construction of the antitrust laws.[8] To ignore a monopolist's malicious intent in such a case, as the Sixth Circuit majority did here, is to disregard this Court's familiar admonition that where predatory pricing is involved, knowledge of the predatory party's "actual intent is an aid in the interpretation of facts and prediction of consequences." *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 n.12 (1967). The decision further confounds the long-standing doctrine that "even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sher-

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8. *Per se* rules, whether they be legal or illegal, should not be crafted from economics textbooks but from a careful review of all the facts and market impact. *Compare, NCAA v. Bd. of Regents of the University of Oklahoma*, 104 S.Ct. 2948, 2962 (1984):

> "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."

man Act." *Maryland & Virginia Milk Prod. Assoc. v. United States,* 362 U.S. 458, 472 (1960). The motive and intent of a defendant are and always have been a critical inquiry in an antitrust case. It is no less true in a predatory pricing case because price cutting "may be used in violation of the Act. Thus it may be the instrument of monopoly power to eliminate competitors or to bring them to their knees. But since it is not unlawful *per se,* facts and circumstances must be adduced to show that it was *in purpose or effect* employed as an instrument of monopoly power." *Schine Chain Theatres v. United States,* 334 U.S. 110, 120-21 (1948). Thus, the majority decision here totally ignores the even more fundamental rule that ". . . in a civil action under the Sherman Act, liability may be established by proof of *either an unlawful purpose or an anticompetitive effect.*" *McLain v. Real Estate Bd. of New Orleans, Inc.,* 444 U.S. 232, 243 (1980). The Sixth Circuit decision here enjoys the dubious distinction of disregarding *both* the unlawful purpose and the anticompetitive effect of respondents' conduct in favor of a textbook rule of "pristine" economics. This case marks an irreconcilable collision between traditional monopoly law and modern but disputed economic theories—this Court's review is essential to a determination of which shall prevail.

Secondly, the Sixth Circuit majority held, *as a matter of law,* that asphalt paving companies engaged in the construction and repair of interstate highways are not engaged "in commerce" within the meaning of Section 7 of the Clayton Act (15 U.S.C. §18) prior to its 1980 amendment. This holding squarely conflicts with the Fifth Circuit's Clayton §7 decision in *Fort Lauderdale v. East Coast Asphalt Corp.,* 329 F.2d 871, 872 (5th Cir.), *cert. denied,* 379 U.S. 900 (1964) which held that "contractors engaged in the construction of interstate highways . . . are engaged 'in commerce.'" In *Overstreet v. North Shore Corp.,* 318 U.S. 125 (1943), this Court flatly held that

persons engaged in maintaining and repairing roads and bridges are engaged "in commerce." Thus, the instant holding is at odds with these leading cases and requires review as an important jurisdictional issue common to many cases arising under the antitrust laws.

Finally, the Sixth Circuit's holding that a private antitrust plaintiff cannot, *as a matter of law*, obtain divestiture as remedial injunctive relief against an illegal monopolist under Section 16 of the Clayton Act (15 U.S.C. §26) is contrary to the ruling of the Third Circuit in *NBO Industries Treadway Cos., Inc. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3rd Cir. 1975). Here again is an important jurisdictional and substantive issue that will arise again and again in monopoly cases. If a district court is powerless to break up a monopoly and effectively restore competition to the impacted market, the private plaintiff's only ultimate remedy is to file a new treble damage case every four years and promote a multiplicity of suits.

It is clear from the foregoing that the Sixth Circuit's decision in this case involves both important and unsettled questions of antitrust law that are in conflict among the Circuit Courts of Appeal. Further, the Sixth Circuit, we are respectfully compelled to say, has decided such questions in a way that disregards, breeds confusion with, and draws into serious question, applicable decisions of this Court.

I. AN ILLEGAL MONOPOLIST'S PRACTICE OF LIMIT PRICING SHOULD NOT BE HELD LEGAL AS A MATTER OF LAW WHERE THERE IS DIRECT EVIDENCE THAT THE INTENT AND EFFECT WAS TO ELIMINATE COMPETITION AND MAINTAIN THE MONOPOLY.

"The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or

maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident . . . . [M]onopoly power [is defined] as 'the power to control prices or exclude competition.'" *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). "[T]he use of monopoly power, *however lawfully acquired*, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States v. Griffith*, 334 U.S. 100, 107 (1948); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973).

> "The mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of §2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

As Judge Wilhoit points out in his dissent in this case monopolization was proved (729 F.2d at 1061; A21-A22):

> ". . . the record in this case convinces me that Johnson was found to be guilty of monopolistic practices, including predatory pricing. The evidence is clear that Johnson specifically intended to drive Langenderfer out of business. Moreover, Johnson's rapid and numerous vertical as well as horizontal acquisitions documents well that it had the power to carry out this intent.
>
> "The alleged predatory pricing in this case was nothing more than a manifestation of Johnson's monopoly power. The majority readily admits that

> Johnson had 'attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors.' *Ante* at 1058. It is clear, therefore, that Johnson possessed substantial market power over its competitors, market power which when coupled with the evidence of Johnson's increasing market share (from 46.9% to 75.8%) indicates it undoubtedly possessed *monopoly* power."

To prove an attempt to monopolize, petitioners only had to show: a specific intent to monopolize; anticompetitive conduct; and a dangerous probability of success. *Lorain Journal Co. v. United States,* 342 U.S. 143, 153-54 (1951). All that was shown—*no one argues otherwise.* Petitioners proved a jury case under Sherman §2 *whether or not* respondents' bidding practices constituted predatory pricing or were "wholly innocent" in an isolated context or an economics textbook sense. There is "no accepted interpretation of the Sherman Act which condition[s] a finding of monopolization under §2 upon a showing of predatory practices by the monopolist." *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481, 497-98 (1968). "If the end result is unlawful, it matters not that the means used in violation may be lawful." *California Motor Transport v. Trucking Unlimited,* 404 U.S. 508, 515 (1972). This is so because even *lawful* conduct is tainted by the monopoly where it is used for an improper purpose as this Court has repeatedly recognized. "Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce." *Schine Chain Theatres v. United States,* 334 U.S. 110, 119 (1948); *United States v. Griffith,* 334 U.S. 100, 105 (1948). "The purpose or intent to create or maintain a monopoly transforms what might otherwise be a legal method of doing business into an illegal method under Section 2 of the Sherman Act." *Alles Corporation v. Senco Products, Inc.,* 329 F.2d 567, 572 (6th Cir. 1964) citing *Lorain Journal Co. v. United States,* 342 U.S. 143, 155 (1951). Thus,

whether or not respondents' bidding practices are innocent standing alone, as if they existed in a vacuum, as the majority has considered them here, is totally immaterial since "[i]t is *not* essential to a finding of monopolization, however, that acts or practices used to maintain monopoly power *be in themselves independently unlawful.*" *Borden, Inc. v. FTC*, 674 F.2d 498, 513 (6th Cir. 1982), *vacated*, 103 S.Ct. 2115 (1983).

> "Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute [§2] forbids, they come within its prohibition." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

By viewing the respondents' bidding practices with a "pristine economic view" (J. Wilhoit dissenting, 729 F.2d at 1062; A23) unconnected to the total factual context of this case and blind to the malevolent purpose behind them and their devastating effect on competition, the majority has failed to heed these fundamental considerations and to give the petitioners the benefit of all their proof. As stated in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962):

> "It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten*, 226 U.S. 525, 544 . . .; and in a case like the one before us, the duty of the jury

> was to look at the whole picture and not merely at the individual figures in it.' *American Tobacco Co. v. United States,* 147 F.2d 93, 106 (CA 6th Cir.). See *Montague & Co. v. Lowry,* 193 U.S. 38, 45-46."

Thus, respondents' bidding practices cannot be viewed in an academic vacuum, separate and apart from the entire textual fabric of a monopoly case, including the market structure, the overwhelming concentration of monopoly power, the unlawful threats and coercion, monopolistic and discriminatory stone pricing, profit squeezing and the host of other anticompetitive activities from which respondents' bidding leverage springs. "Plaintiff's evidence should be viewed as a whole. Each of the 'six things' [anticompetitive acts] viewed in isolation need not be supported by sufficient evidence to amount to a §2 violation. It is enough that taken together they are sufficient to prove the monopolization claim." *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.,* 738 F.2d 1509, 1522 n.18 (10th Cir. 1984). "A successful party in the District Court may sustain the judgment on any ground that finds support in the record." *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957).

The Sixth Circuit's perspective in this case totally overlooks the fact that the monopolist has plainly attained its "greater efficiencies and economies of scale," not through internal growth, a superior product or economic inevitability, as recognized by *Grinnell, supra,* at p. 16, but by a series of anticompetitive acquisitions that the majority itself concedes from the evidence were undertaken with willful intent "to eliminate competition and dominate the market" resulting in "significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure." (729 F.2d at 1054; A5-A6). Thus, the "economies of scale" and "greater efficiencies" with which the respondents have so fervently been smothering competition, are the ill-

gotten fruits of the "monopolistic market structure" which the respondents themselves have unlawfully created. If the monopolist in this case can achieve ultimate success by buying out its major competitors; cornering the essential raw materials needed by its weaker competitors and selling them at monopolistic and discriminatory prices; by intimidating its rivals not to build their own plants and then pricing below all their costs year after year with the power thus attained, *in the face of a judicially recognized intent "to eliminate competition and dominate the market,"* then Section 2 of the Sherman Act has become a useless piece of paper against ruthless and monopolistic conduct. The Sixth Circuit has forgotten that "If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed . . . . [An action by a monopolist] may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor . . . . may it be used to stifle competition by denying competitors less favorably situated access to the market." *Griffith, supra* at 108. Respondents' bidding practices were transformed by the whole monopolistic scheme into predatory pricing and that issue was properly submitted to the jury whether or not said bidding was slightly above, below or at respondents' total costs, all of which was true here.[9]

The instant case affords this Court a singular opportunity to define predatory pricing in an illegal mo-

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9. The Sixth Circuit majority was obviously misinformed when it stated that "Langenderfer presented *no* evidence that Johnson *ever* submitted a bid for an ODOT or OTC project at less than cost plus overhead." 729 F.2d at 1055; A8-A9. In relying on respondents' representations to this effect, the Court was both misled and mistaken. There was unrebutted evidence by respondents' own estimator at trial that respondents' total bids on at least two major projects were unquestionably below their own total cost plus overhead (AI 379-84). In addition, Kirkby himself admitted to bidding against Langenderfer and Miller at zero profit "just to see how tough the competition is." Their estimator almost always bid specific line items which they monopolized at or below their costs (AI 383-387).

nopoly context without the economic confusion and accounting debate that usually accompany predatory pricing cases. The Sixth Circuit has created a *legal per se* rule which makes an illegal monopolist's motive and intent irrelevant. No Court of Appeals has yet gone so far.[10] As such, it strikes at the very heart of the Sherman Act where the general rule prevails that ". . . in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose *or* an anticompetitive effect." *McLain v. Real Estate Bd. of New Orleans,* 444 U.S. 232, 243 (1980); *United States v. United States Gypsum Co.,* 438 U.S. 422, 436 (1978). It is high time to draw the line before "modern" economic theories totally swallow up traditional monopoly principles. This is dramatically pointed out in the dissenting opinion herein where Judge Wilhoit states that what the majority of the Court has done is to create a *per se* rule of *legality* for "limit pricing," whereby, regardless of a monopolist's evil or malicious intent to drive his competition out of the market and his willful and effective acts to achieve that end, his conduct is conclusively presumed *legal* so long as he prices above his total costs. "What the Court seems to do is to create a 'free zone' in which monopolists can exploit their power without fear of Sherman Act scrutiny or sanctions." (729 F.2d at 1061; A21).[11] With all due respect, what the

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10. Two other Courts of Appeal, the Seventh and First, have embraced the rule that a monopolist is not liable for predatory pricing so long as it sells above its average total costs. But, in each of those cases, the defendant was a *legal* monopolist which had acquired its dominant position by virtue of superior product, business acumen or historic accident, not by virtue of anticompetitive acquisitions and other reprehensible conduct as respondents did here. In addition, AT&T's pricing was subject to public regulation. *MCI Communications v. American Tel. & Tel. Co.,* 708 F.2d 1081 (7th Cir.), *cert. denied,* 104 S.Ct. 234 (1983); *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227 (1st Cir. 1983). Of course, the Ninth Circuit applies a contrary rule *even* where the defendant is a legal monopolist like IBM. *Transamerica Computer Co., Inc. v. IBM Corp.,* 698 F.2d 1377, 1388 (9th Cir. 1983).

11. The same concern was noted by the Ninth Circuit in *Transamerica*: "A rule based exclusively on cost forecloses con-

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Sixth Circuit majority has further done is to invite and condone monopoly by acquisition while writing intent and motive out of predatory pricing. This is contrary to the pronouncements of this Court and the ultimate triumph of economic theory over judicial experience. It is even inconsistent with the Sixth Circuit's own decisions, as pointed out by Judge Wilhoit dissenting (*Id.* at 1060; A20):

> "This Circuit has previously taken the view that evidence of intent to predatorily price can be proven either by direct evidence (subjective proof) or by indirect evidence, through analysis, of whether a defendant was pricing above or below average variable cost (objective proof)."[12]

The construction the Sixth Circuit majority has placed on this aspect of predatory pricing is truly of landmark consequence and strongly commends this matter to review by this Court. The direct, unrebutted nature of respondents' predatory intent is unmistakably etched on this record.

Respondents knew their competitors couldn't meet their paving bids because they sold to Langenderfer or other competitors, at monopolistic and discriminatory prices, the very stone or sand they needed to compete. With the excessive profits thus knowingly extracted, respondents then bid the projects substantially below all their competitors' costs.[13] The statistical evidence was undisputed—

Footnote continued—
sideration of other important factors, such as intent, market power, market structure, and long-run behavior in evaluating the predatory impact of a pricing decision." 698 F.2d at 1387.

12. Citing: *D. E. Rogers Assoc. Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1983); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1982); and *Borden, Inc. v. FTC*, 674 F.2d 498 (6th Cir. 1982).

13. The majority did not even comment on this phenomenon —known as profit squeezing and found predatory in and of itself by petitioners' economists (AII 778-781). "[T]he use of monopoly power attained in one market to gain a competitive

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when Johnson won the jobs, its bids were 5-10% below the second lowest bidder. This went on year after year, Johnson giving up profits on the jobs ("leaving money on the table") as Kirkby explained to keep Miller and Langenderfer from getting jobs and to keep other competitors from coming into the area because to keep their position in the business the respondents had to be dominant (AI 564, AII 617-618). *There was no evidence that Kirkby was merely doing this to meet lower prices of his competitors.* He was deliberately sacrificing short-run profits to discipline his opponents and maintain the monopoly. The Sixth Circuit allowed how this presented "an unpleasant choice" for smaller firms which have to forego sales or operate at a loss (729 F.2d 1056; A11-A12).[14] Kirkby admitted the malice of his conduct when he stated under oath that he bid against Miller and Langenderfer at zero or no profit "just to see how tough the competition is" (AII 609-610). This direct and unrebutted evidence of predatory intent falls squarely within the classic definition of predatory pricing

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Footnote continued—

advantage in another is a violation of §2, even if there has not been an attempt to monopolize the second market." *Berkey Photo, supra* at 275; *United States v. Aluminum Co. of America*, 148 F.2d 416, 438 (2d Cir. 1945).

Of course, Johnson did Alcoa and Kodak one better—here it monopolized both markets, the essential raw materials and the paving market dependent thereon. Dissenting Judge Wilhoit grasped the significance of this profit squeezing: "This [the majority's analysis] overlooks the fact that Johnson was probably the only supplier of gravel in the relevant region. It supplied both its own needs and that of its competitors. Johnson could, therefore, raise the price of gravel to its competitors and thereby subsidize sales of gravel to itself. Those below-cost *line* items may very well be a significant indicator of how Johnson was able to keep its 'average total cost' figures so low." 729 F.2d at 1062; A24-A25.

14. The euphemistic "unpleasant choice" had a devasting impact on competition in the market: Langenderfer and Modern Construction were driven out; three smaller contractors gave up bidding at all when Johnson was involved; and six or seven outside competitors removed their plants and did not even come into Northwestern Ohio any more (AI 330-31; 95-98, AIII 7; PX 16).

announced by the Fifth, Sixth and Ninth Circuits referenced in *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982); and *D. E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1439 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 3513 (1984):

> "Pricing is predatory when a company foregoes short-term profits in order to develop a market position such that the company can later raise prices and recoup lost profits. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031 (9th Cir. 1981). Predatory pricing differs from healthy competitive pricing in its *motive*: 'a predator by his pricing practices seeks "to impose losses on other firms, not garner gains for itself." ' *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853-54 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S. Ct. 975, 71 L.Ed.2d 113 (1981)."

It is plain to see that any man controlling up to 75% of the market who brazenly admits under oath that he was bidding at his cost "just to see how tough his competition is" was solely interested in visiting losses on his struggling competitors not earning profits for himself. This is direct evidence of malicious predatory motive of the most probative force. We do not know of a single case in any of the Circuits which has this kind of compelling evidence. The majority's failure to give any effect to this direct and unrebutted evidence of predatory intent and to hold that it doesn't matter what the monopolist's intent was as long as he makes a profit, is in direct contradiction to *D. E. Rogers Associates, Inc., supra*, at 1436 ("Motive being the distinguishing characteristic of predatory pricing . . . ."); and *Richter Concrete, supra*, at 823 ("Predatory pricing differs from healthy competitive pricing in its motive . . . ."). These cases and those they cite stand for the proposition that motive or intent is *the* critical factor in determining predatory pricing. This follows this Court's rule that in a predatory pricing case,

knowledge of a predatory party's actual intent is an aid in the interpretation of facts and prediction of consequences. *Utah Pie Co. v. Continental Banking Co.*, 386 U.S. 685, 696-702 (1967). "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . . ." *Compare, Poller v. CBS*, 368 U.S. 464, 473 (1962).

To give no effect to the avowed intent of the respondents to eliminate competition and maintain their monopolistic position and to hold that their bidding practices are conclusively presumed legal is contrary to principles announced and the evidence relied upon in leading predatory pricing cases including *Utah Pie, supra.*[15] If, as the Fifth, Sixth and Ninth Circuits have held in these other recent cases (and as the majority herein confusingly admits at 729 F.2d at 1057; A12), "motive or intent is the distinguishing characteristic of predatory pricing," how can respondents' pricing practices herein be *legal per se*, as the majority finds, regardless of the admitted vicious intent of the respondents? The internecine impasse in logic is self-evident. "Actual intent to injure another competitor" does not fall in the category of "fierce competitive instincts." *Utah Pie, supra* at 702-03; fn.15. The instant case and others like it that "require pricing below marginal cost as essential to a prima facie predatory pricing case, cannot be considered consistent with *Utah Pie's* language or intent." In fact, "[n]o circuit has accorded the Supreme Court's 1967 *Utah Pie* decision a dominant role in evaluating the propriety of the de-

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15. In words apt here: "[T]he Court of Appeals almost entirely ignored other evidence which provides material support for the jury's conclusion that Pet's behavior satisfied the statutory test regarding competitive injury. This evidence bore on the issue of Pet's predatory intent to injure Utah Pie." 386 U.S. at 696.

fendant's conduct. Thus, the time appears ripe for the Supreme Court to clarify its position further."[16]

II. CORPORATIONS ENGAGED IN PAVING INTERSTATE HIGHWAYS ARE ENGAGED "IN COMMERCE" WITHIN THE MEANING OF SECTION 7 OF THE CLAYTON ACT.

The Sixth Circuit held that Johnson's acquisitions of its four asphalt paving competitors was outside the jurisdictional scope of Clayton §7 (before its amendment in 1980) because the asphalt pavers were not engaged "*in* commerce" however much their work might *affect* commerce.[17] This Court has long held that persons or corporations engaged in the construction, maintenance or repair of interstate transportation facilities are "engaged in commerce." *See Overstreet v. North Shore Corp.*, 318 U.S. 125 (1943); *Pedersen v. J. F. Fitzgerald Construction Co.*, 318 U.S. 740 (1943); *Cf. Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953). *See also, Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427 (1955); *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207 (1959). Jurisdiction under Section 7 of the Clayton Act (A56), which then required[18] that the

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16. Hurwitz and Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 111-113 (1982).

17. Although the Sixth Circuit majority used its Clayton §7 ruling as a collateral ground for ordering a new trial, the issue was non-prejudicial and warrants no remand. In the first place, even respondents never argued that the Union Quarries acquisition wasn't "in commerce." Therefore, Clayton §7 evidence was admissible and a jury charge thereon proper. It was harmless error, in any event, because all these acquisitions were admissible in support of the Sherman §2 claim and merely overlapped Clayton §7 in this instance. *Cf. United States v. First National Bank & Trust of Lexington*, 376 U.S. 665, 671-72 (1964); and *Costner v. Blount National Bank*, 578 F.2d 1192, 1196 (6th Cir. 1978).

18. The statute was amended in 1980, after the challenged acquisitions involved here, to expand jurisdiction to acquisitions in which both the acquiring and the acquired companies are "engaged in commerce or in any activity affecting commerce." Pub.L. No. 96-349, §6(a), 94 Stat. 1157. Section 6(b) of Pub.L. No. 96-349 limited application of the amendment to acquisitions made after September 12, 1980.

acquiring and acquired corporations be "engaged in commerce," has likewise been held to encompass corporations directly engaged in the construction, maintenance and repair of interstate highways. *See Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871, 872 (5th Cir.), *cert. denied*, 379 U.S. 900 (1964).

The Sixth Circuit Court of Appeals *incorrectly* held here (729 F.2d at 1059; A17) that the *Fort Lauderdale* rule is "no longer valid" in light of *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). In *Copp Paving*, this Court rejected extension of the Clayton and Robinson-Patman Acts to persons or activities which are not themselves directly involved "in commerce." In *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), this Court stated: "To be engaged 'in commerce' within the meaning of §7, a corporation must itself be directly engaged in the production, *distribution*, or acquisition of goods or services in interstate commerce." *Id.* at 283 (citing *Copp Paving*).

The *Fort Lauderdale* rule was *not* expressly or impliedly overruled by the *Copp Paving* decision. In *Copp Paving*, the challenged activities involved *suppliers* of asphaltic paving materials but not the *pavers* themselves. This Court refused to apply a "nexus" test to extend jurisdiction to such persons indirectly and remotely involved *as suppliers* in the construction of interstate highways. The *Copp* court said as follows (419 U.S. at 195):

> "In contrast to [Sherman] §1, the distinct 'in commerce' language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities *within the flow of interstate commerce—the practical economic continuity* in the generation of goods and services for interstate markets *and their transport and distribution to the consumer.*"

Clearly, corporations engaged in the business of paving "indispensable instrumentalities" of interstate commerce are within the flow of interstate commerce and, therefore, fall within the jurisdictional ambit of §7 of the Clayton Act. In fact, asphalt pavers literally stand *in* the stream of interstate commerce and make it all possible by the construction and repair of the very arteries of commerce itself. *See Alstate Construction Co. v. Durkin, supra; Overstreet v. North Shore Corp., supra,* and *Mitchell v. Vollmer & Co., supra,* at 429: "The question whether an employee is engaged 'in commerce' within the meaning of the present Act [FLSA] is determined by practical considerations, not by technical conceptions . . . . the Test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity . . . . Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act . . . . And we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category."

III. DIVESTITURE SHOULD BE AVAILABLE IN A PRIVATE ANTITRUST ACTION AS REMEDIAL INJUNCTIVE RELIEF UNDER SECTION 16 OF THE CLAYTON ACT (15 U.S.C. §26) AGAINST AN ILLEGAL MONOPOLY.

The Sixth Circuit majority opinion holds that, under Section 16 of the Clayton Act (15 U.S.C. §26), divestiture is not available as remedial injunctive relief to a successful private plaintiff in a monopoly case. There are no decisions of this Court squarely on point. There is an apparent conflict between two other Circuit Courts that have addressed this issue: The Ninth Circuit holding it is not available, *I.T.&T. Corp. v. G.T.E. Corp.*, 518 F.2d 913, 920-

24 (9th Cir. 1975); the Third Circuit opining that it is, *NBO Industries Treadway Cos., Inc. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3d Cir. 1975). We believe it is a novel and very important question for this Court to decide in the interpretation of the antitrust laws as a whole. If a private plaintiff proves a monopoly exists but the court doesn't act to break it up, it will continue to exercise its power and dominate the market by the very force of its presence:

> "Once a firm gains a measure of monopoly power . . . because of such actions as restrictive combinations with others, it may discover that the power is capable of being maintained and augmented merely by using it." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979).

The right to injunctive relief given to a private plaintiff under Clayton §16 is to be broadly construed because actions by such parties "also serve the public interest in that they 'effectively pry open to competition a market that has been closed by defendants' illegal restraints.' " *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 133 (1969). The Northwestern Ohio asphalt paving market has now been successfully monopolized by respondents for the last twelve years; that market will never be effectively pried open to free and open competition while respondents' monopoly is still intact—*it remains in place today*. This issue is ripe and commends itself to review and consideration by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Dated: September 27, 1984.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[729 F.2d 1050]

(Filed March 15, 1984)

Nos. 80-3705, 81-3065, 81-3114, 81-3115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs-Appellees, Cross-Appellants,
MAC RITCHIE MATERIALS, INC.,
Proposed-Intervenor-Appellant, (81-3115),

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants, Cross-Appellees.

ON APPEAL from the United States District Court
for the Northern District of Ohio.

Before: LIVELY, *Chief Circuit Judge;* WELLFORD, *Circuit Judge;* and WILHOIT, *District Judge.**

WELLFORD, *Circuit Judge,* delivered the opinion of the Court, in which LIVELY, *Chief Circuit Judge,* joined. WILHOIT, *District Judge* (pp. 19-23) [A20-A25] filed a separate dissenting opinion.

WELLFORD, Circuit Judge. [729 F.2d 1052] Defendants, S. E. Johnson Company (Johnson) and other affiliated entities (referred to collectively as Johnson Companies), appeal the judgments, and orders entered by the district court

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*Honorable Henry R. Wilhoit, Jr., U. S. District Court for the Eastern District of Kentucky, sitting by designation.

against them following a unanimous jury verdict for plaintiffs in this private antitrust action for alleged violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 and Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18. Plaintiffs, Arthur S. Langenderfer, Inc. (Langenderfer), and its sister company, Northern Ohio Asphalt Paving Co. (NOAP), claimed defendants had combined and conspired to drive plaintiffs out of business by various monopolistic and anticompetitive practices including, but not limited to, predatory pricing and illegal acquisitions. The jury found actual damages of $982,117.00. The district court trebled the damage award to $2,946,351.00 and enjoined future acquisitions and anticompetitive acts, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

Defendants contend the district court erred by (1) failing to apply the appropriate legal standard to plaintiff's allegation of predatory pricing; (2) allowing the jury to find a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, on the basis of purely intrastate acquisitions; and (3) allowing damages for losses suffered outside the relevant market and beyond the statute of limitations period. Langenderfer cross-appeals from the district court's refusal to order divestiture and the refusal to allow post-trial intervention by a company affiliated with Langenderfer. We vacate the judgments below because of prejudicial error on the issues of predatory pricing and intrastate acquisitions.

FACTS

Langenderfer and S. E. Johnson were competitors for many years in the business of supplying "hot-mix,"[1] stone,

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1. "Hot-mix" is also known as asphaltic concrete. It is manufactured by combining liquid petroleum with a mixture of sand and crushed limestone at high temperatures.

sand and contracting services for highway construction and repair in northwest Ohio. Most of this work is administered and paid for by governmental bodies which invite competitive bids from paving contractors.[2] Federal and state highway projects are administered by the Ohio Department of Transportation (ODOT) and the Ohio Turnpike Commission (OTC) with substantial use of federal funds.[3] For the purpose of this appeal [1053] the parties have stipulated the relevant product and geographic market to be asphalt highway paving contracts awarded by the OTC and ODOT in a thirteen county area of northwest Ohio.

Successful bidders must supply all labor, materials, equipment and supervision to do the work at per-unit prices specified in the winning bid. The primary costs in performing paving projects are the cost of materials and the cost of hauling materials to the job site. Contractors attempt to minimize expenses by purchasing materials from the quarry or hot-mix plant closest to the job.[4]

Plaintiffs, Langenderfer and NOAP are Ohio corporations, with all voting stock owned by Burton R. MacRitchie

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2. State law requires competitive bidding. *Ohio Rev. Code* Chapters 5525 and 5537. State agencies determine where and whether a project will take place and reserve the right to reject any and all bids.

3. The volume of available highway work is directly dependent on the amount of funds allocated to the state highway program. Substantial completion of the interstate highway system in the late 1960's resulted in a significant decrease in funds allocated for new highway construction in Ohio during the 1970's. The highway program in northwestern Ohio during the 1970's was primarily limited to maintaining and upgrading the existing roadways.

4. The practical service area of a hot-mix plant is limited to a 25-30 mile radius due to hauling costs and the need to deliver the product at specified temperatures. The plants are typically located at or near quarries because of the high cost of hauling stone.

and his two sons. Langenderfer was in the asphalt paving business for 55 years until it discontinued operations in 1978 due to its inability to compete profitably. Unlike many highway contractors, Langenderfer did not diversify its operations but remained an asphalt paving specialist. While Langenderfer was still in business, NOAP had four hot-mix plants in northwest Ohio. The MacRitchie family also owned MacRitchie Materials, Inc.,[5] which operated a quarry in West Millgrove, Ohio, and supplied stone to two of Langenderfer's hot-mix plants.

Defendants are the S. E. Johnson Co. (Johnson), founded as an Ohio corporation in 1929 by Sherman E. Johnson, various associated and subsidiary companies, and John T. Kirkby, the current president of Johnson. Following the Second World War, Johnson established the Maumee Stone Co. and opened a quarry to have an assured source of limestone for road building. The Michigan Stone Co. was set up in 1952 to operate two additional quarries just across the Ohio-Michigan border. With these quarries supplying raw materials and with three hot-mix plants to service the area, Johnson was already the largest asphalt paving contractor in northwest Ohio by the time of Sherman Johnson's death in 1956.

Defendant, John T. Kirkby, succeeded Mr. Johnson as president and operating head of the defendant companies. He soon began an ambitious acquisition program, acquiring twelve different companies within a fifteen year period.

In 1961, Johnson purchased C. P. Calaway, Inc., an independent bridge contractor. This enabled it to perform its own bridge work rather than subcontracting to other companies.

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5. MacRitchie Materials, Inc. is the sister company that unsuccessfully sought to intervene following the trial below.

Mr. Kirkby then turned his attention to vertical acquisitions of raw material sources in northwest Ohio. Defendant Maumee Stone acquired the quarries of Wood County Stone & Construction Co. (1961), Lime City Stone Co. (1962), and Auglaize Stone Co. (1965). Maumee Stone opened the Rocky Ridge quarry under a 25-year lease in 1970. In 1974, defendants acquired the Tri-State Sand & Gravel Co., which is described as the most important source of quality sand in northwest Ohio.

In the late 1960's Johnson began a series of horizontal acquisitions of asphalt paving competitors. In 1969 Johnson purchased paving equipment from the Price Construction Co., including two hot-mix plants that served three counties to the east of Toledo. When Price moved a third hot-mix plant to Maumee to compete with defendants' operation, Mr. Kirkby offered to buy out Price, but Price agreed not to compete for ten years. Johnson purchased Ohio Engineering Co. in 1970 and thereby acquired three hot-mix plants that served several counties south of Toledo. Fred R. Creager & Sons, a small contractor on the verge of bankruptcy, was purchased in 1971 for $1 and an assumption of liabilities. Johnson bought two plants and certain gravel leases in 1972 from Northwest Materials, Inc., [1054] which was being liquidated at the time. Except for Creager, each competitor was a viable, profitable, ODOT-qualified paving contractor. Each company except Northwest Materials was acquired under a contract whereby the sellers agreed not to compete with Johnson for a number of years. In 1979, just prior to the trial below, defendants paid $3.5 million for Union Quarries Co., a profitable competitor that owned a quarry, a hot-mix plant and an asphalt paving business that served three counties in northwest Ohio.

Substantial evidence indicated that Kirkby, both individually and as chief officer of Johnson, intended to elim-

inate competition and dominate the market. In addition to the noncompetition agreements previously mentioned, there was considerable testimony that Kirkby or his agents had threatened or coerced several smaller competitors. Kirkby allegedly told one competitor that if he built an asphalt plant to compete with the Maumee plant, defendants would immediately build a larger facility across the street to drive the competition out of business. Another competitor who planned to build a hot-mix plant was told that defendant would not supply the necessary stone for operation of the plant. On another occasion, Kirkby allegedly said that he did not like Langenderfer or Miller (another competitor) and wanted to run them out of business.

Langenderfer presented expert testimony from several economists to the effect that Johnson's acquisitions significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure. Statistical evidence does support this testimony. Defendants' average annual share of ODOT and OTC projects from 1966-1971 was 46.9%, but they took well over half of the available work during the 1972-78 period.[6] Johnson Companies did 75.8% of all turnpike paving in northwest Ohio during this period.

In summary, Kirkby expanded operations of the Johnson Companies from two quarries and three hot-mix plants to seven quarries, fourteen hot-mix plants, and three sand pits. The horizontal acquisitions eliminated a noticeable segment of Johnson Companies' competition, and the vertical acquisitions gave defendants a captive supply of stone

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6. Defendants' annual shares of the relevant ODOT and OTC projects were as follows: 1972 - 65.3%; 1973 - 57.6%; 1974 - 82.5%; 1975 - 53.2%; 1976 - 62.6%; 1977 - 70.4%; 1978 - 51.3%.

and sand for its asphalt paving jobs. Furthermore, defendants became primary stone supplies for the remaining asphalt paving competitors who did not own conveniently located quarries. As Johnson increased its share of the ever decreasing market, it also increased its profitability. From 1970 to 1978, its annual net profits more than doubled—from $1.168 to $2.717 million. During this same period, the Johnson Companies' competitors went from a combined net profit of $655,000 to a combined net loss.

Langenderfer's claims of unreasonable restraint of trade in violation of Section 1 of the Sherman Act, monopolization and conspiracy or attempt to monopolize in violation of Section 2 of the Sherman Act, and illegal anticompetitive acquisitions in violation of Section 7 of the Clayton Act were all submitted to the jury. In support of the Sherman Act claims, Langenderfer alleged twelve separate monopolistic acts including, among others, predatory pricing, monopolistic pricing, price discrimination, exclusive dealing, refusals to deal, tying, and profit squeezing. The trial court denied defendants' request for special interrogatories. In returning the general verdict in favor of Langenderfer the jury was not required to specify which portions of the Sherman and/or Clayton Acts were violated nor which of the various alleged monopolistic acts were committed by appellants.

PREDATORY PRICING

In order to recover under Section 2 of the Sherman Act, whether for [1055] monopolization[7] or an attempt to monop-

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7. To establish monopolization of the ODOT-OTC asphalt paving market, Langenderfer had to prove that Johnson unfairly attained or maintained monopoly power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Monopoly power is "the power to control prices or exclude competition." *Id.* at 571.

olize,[8] Langenderfer had to establish that Johnson engaged in some type of prohibited anticompetitive conduct. *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982). Langenderfer alleged several different kinds of anti-competitive acts, but the evidence presented at trial clearly focused on the claim of predatory pricing.[9] As the district court stated in the January 27, 1981, Final Judgment for Injunctive Relief:

> The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects. At trial, plaintiffs vigorously attempted to show how defendants deliberately excluded competition by bidding low and deliberately sacrificing short term profits for the purpose of driving rivals out of business.

Defendants contend that as a matter of law, predatory pricing was not established because Langenderfer presented no evidence that Johnson ever submitted a bid for

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8. To establish that Johnson attempted to monopolize the ODOT-OTC asphalt paving market, Langenderfer had to prove that appellant "engaged in anticompetitive conduct with the specific intent to monopolize and that the attempt had a dangerous probability of success." *Richter Concrete Corp. v. Hilltop Corp.*, 691 F.2d 818, 823 (6th Cir. 1982), (quoting *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981)).

9. Support for the allegations of other types of anticompetitive conduct was meager at best. Although injunctive relief was granted against a broad array of wrongful acts, the trial court made the following observation about Langenderfer's proof:

> Plaintiffs request injunctions against certain anticompetitive practices of the defendants *which were not specifically proven by evidence at trial.* For example, plaintiffs seek prohibitions against the defendants' alleged practices of charging discriminatory stone prices, refusing to sell stone or sand to plaintiffs, and tying sales of asphaltic concrete to purchases of stone and sand. (emphasis added)

an ODOT or OTC project at less than cost plus overhead.[10] In fact, defendants consistently made a profit on their successfully bid state highway and turnpike projects. Nevertheless, the district court denied Johnson's motion for a directed verdict on the issue and chose not to instruct the jury on the legal test for predatory pricing.[11] Instead, the trial court "felt it was appropriate to let the jury decide where that line was to be drawn." We conclude from all the evidence, however, that the trial court erred by failing to grant a directed verdict in favor of defendants on the issue of predatory pricing.

While we recognize the basis for Judge Wilhoit's concern as to predatory pricing, we are unpersuaded by his argument. If a producer has achieved greater efficiency due to his economies of scale, it would be contrary to the purposes of the Antitrust laws to require that he price his product at a level higher than what he requires to make a profit. Johnson continually made profits on its ventures. This is not a case where the defendant failed to account for his long term overhead costs in making his bids. The bids were above the *total* average costs. To require that Johnson's bids be above competitors' costs would

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10. Langenderfer attempts to rely on the testimony of Howard Shank who was Johnson's Vice President and chief bidding estimator. Shank testified that in preparing bids, he often programmed specific items below cost. The relevant product in this case, however, was the *total package* of asphalt paving materials and services, not specific line items in a contract bid. It matters little that Johnson might have employed a below-cost figure for gravel or any other item so long as the final bid exceeded the company's *total projected costs*.

11. Even if the evidence had been sufficient to avoid a directed verdict, the trial court's failure to instruct the jury on the legal standard for predatory pricing was erroneous. "The choice of a cost-based standard for evaluating claims of predatory pricing is a question of law to be decided by the trial judge." *M.C.I. Communications Corp. v. A.T.&T. Co.*, 708 F.2d 1081, 1111 (7th Cir. 1983).

deprive Johnson (and others similarly situated) of [1056] reward from greater efficiency. This would serve only to stifle the incentive to compete.[12] Such cannot be the aim of the Antitrust laws of this country. *See, MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

At the time of the trial below, this Circuit had not definitely declared a standard for evaluating claims of predatory pricing. Subsequently, however, a cost-based standard was adopted in *D. E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1982), this court selected the Ninth Circuit's modification of the "Areeda/Turner" rule. *See* Areeda & Turner, *Predatory Pricing & Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975) (Pricing below marginal or average variable cost presumed predatory while pricing above marginal or average cost conclusively presumed legal). The Ninth Circuit standard was set forth in *William Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 57 (1982):

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12. Further support for this decision may be drawn from Judge Kennedy's dissent in *Borden, Inc. v. F.T.C.*, 674 F.2d 498, 519 (6th Cir. 1982). While that case dealt with the manipulation of a price premium for a heavily advertised product, not below cost pricing, it was noted by that Judge that "business acumen includes shrewdness in profitable price competition, which is pricing above average variable cost; the Sherman Act does not distinguish competition on the basis of price and performance." *Id.*, citing *California Computer Products v. International Business Machines Corp.*, 613 F.2d 727, 742-43 (9th Cir. 1979). *See also* Areeda & Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," 88 Harv.L.Rev. 697 (1975). Professor (now Judge) Posner would also agree that there is no violation where a monopolist sells above average total cost, as in the instant case. R. Posner, *Antitrust Law: An Economic Perspective*, 188 (1976), *cited in Borden, Inc. v. F.T.C.*, 674 F.2d at 519 n.3. (Kennedy, dissenting).

> [W]e hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Id. at 1035-36. Although this Circuit has adopted the above standard, we reject the Ninth Circuit's recent extension of that standard in *Transamerica Computer Co. v. I.B.M. Corp.*, 698 F.2d 137 (9th Cir. 1983) (pricing above average total costs may be deemed predatory upon clear and convincing proof of predatory intent).

Langenderfer's theory at trial (and in this appeal) was that defendants intentionally and consistently bid below the cost level of smaller competitors. Allegedly, Johnson could have submitted higher bids and still won the paving contracts, but it "left money on the table" in order to make it impossible for other firms to compete. Although Johnson never bid below its own cost, it supposedly engaged in a pattern of predation by forcing competitors to choose between foregoing sales or operating at a loss. No doubt this was an unpleasant choice for smaller firms such as Langenderfer, but Johnson cannot be found to have committed predatory pricing simply because it was more cost efficient than its competitors

and could afford to submit a lower bid on the jobs in question. "It is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms. This is not proscribed by the antitrust laws." *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, [1057] 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

Langenderfer's argument is premised on the false belief that predatory pricing may be found solely on the basis of the seller's intent. We agree that motive or intent is the distinguishing characteristic of predatory pricing, as this Circuit stated in *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1982):

> Predatory pricing differs from healthy competitive pricing in its motive: "a predator by his pricing practices seeks 'to impose losses on other firms not garner gains for itself.'" *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853-54 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981) (footnote omitted).

691 F.2d at 823. Any definition of predatory pricing, however, must also accommodate the economic policies of the antitrust laws to promote efficiency, encourage vigorous competition and maximize consumer welfare.

The rule advocated by Langenderfer would work contrary to these goals by forcing a larger, more efficient firm to maintain artifically high prices to the detriment of the public. In *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983), the court thoroughly reviewed the multiple evils that such a rule would occasion:

> MCI nonetheless argues in its cross-appeal that the district court erred in requiring it to prove that AT & T priced its Hi-Lo service below any measure of cost. MCI contends that if AT & T knowingly sacrificed rev-

enue (i.e., failed to maximize its profits) with the intent to injure competition, this court should hold that behavior to constitute unlawful predatory pricing. In support of this "profit maximization" theory, MCI cites a trio of cases. *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358 n.5 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F.Supp. 423, 432 (N.D.Cal. 1978), *aff'd. per curiam sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972, 101 S.Ct. 3126, 69 L.Ed.2d 983 (1981).

Each of these cases contains language to the effect that a price may be predatory if it is below the short-run profit-maximizing price and barriers to new entry are great. Assuming, *arguendo*, that these statements are more than mere dicta, we must reject such a "profit maximization" theory as incompatible with the basic principles of antitrust. The ultimate danger of monopoly power is that prices will be too high, not too low. A rule of predation based on the failure to maximize profits would rob consumers of the benefits of any price reductions by dominant firms facing new competition. Such a rule would tend to freeze the prices of dominant firms at their monopoly levels and would prevent many pro-competitive price cuts beneficial to consumers and other purchasers. In addition a "profit maximization" rule would require extensive knowledge of *demand* characteristics—thus adding to its complexity and uncertainty. Another, and related, effect of adopting the "profit maximization" theory advocated by MCI would be to thrust the courts into the

> unseemly role of monitoring industrial prices to detect, on a long term basis, an elusive absence of "profit maximization." Such supervision is incompatible with the functioning of private markets. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). We therefore reject MCI's "profit maximization" theory and reaffirm this Circuit's holding that liability for predatory pricing must be based upon proof of pricing [1058] below cost. *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980).

Id. at 1114 (footnote omitted). As more succinctly stated in *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977):

> The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency.

Id. at 1358-59. We agree with this rationale expressed in the *MCI* and *Hanson* cases.

Johnson attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors. On the basis of the record presented, we can express no opinion about whether this position of strength may have resulted from some other types of prohibited anticompetitive acts. We hold only that, as a matter of law, Sherman Act liability cannot be premised on alleged predatory pricing without some evidence that a de-

fendant has charged prices below its total cost for the product sold. Since Langenderfer premised its allegation of anticompetitive conduct almost entirely on the claim of predatory pricing and since the jury was not required to return special interrogatories, we cannot discern whether the jury verdict was based on the legally insufficient proof of predatory pricing or on the other allegations of anti-competitive acts. Consequently, we must vacate the judgment below and remand for new trial.

ACQUISITIONS

Johnson raises two arguments against assessment of liability for violations of Section 7 of the Clayton Act. First, defendants note that six of the acquired companies[13] rarely, if ever, competed with Langenderfer before they were acquired by Johnson. Consequently, they claim the acquisitions had no "anticompetitive effect" on Langenderfer as required under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). We find the argument unpersuasive because appellant mistakenly focuses on *past* competition between Langenderfer and the acquired companies, and because appellant has misinterpreted the holding in *Brunswick*.

The plaintiff in *Brunswick* sought to recover profits it claimed it would have reaped if Brunswick had not acquired and revitalized several failing bowling alleys that competed with plaintiff. Since the antitrust laws were never intended to provide redress for injury caused by *increased* competition, the court rejected plaintiff's theory.

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to

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13. C. P. Calaway, Inc., Price Construction Co., Ohio Engineering, Fred R. Creager & Sons, Northwest Materials, Inc. and Union Quarries Company.

> prevent and that flows from that which made defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489. *Brunswick* does not require proof that the acquisitions had an "anticompetitive effect" *on* Langenderfer. Instead, *Brunswick* requires that Langenderfer's injury result either from a lessening of competition due to the acquisitions or from "anticompetitive acts made possible" by the acquisitions. One of Langenderfer's theories at trial was that the acquisitions eliminated the competitive pressures of the acquired companies and enabled defendants to engage in other monopolistic acts such as monopolistic pricing, profit squeezing, and predatory bidding. If true, this alone satisfies the requirement of *Brunswick*. Absent other error regarding the Clayton Act cause of action, the issue of whether Langenderfer's injuries resulted from "anticompetitive acts made [1059] possible" by the acquisitions was properly a jury question.

Johnson next argues that none of the acquisitions met the jurisdictional requirement of Section 7 of the Clayton Act. At the time of trial the statute was limited to corporate acquisitions where both the acquiring and the acquired companies engaged in interstate commerce.[14] The district court granted Langenderfer's motion for a directed verdict as to Clayton Act jurisdiction because the companies all performed work on interstate highways. The court clearly erred.

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14. The statute was amended in 1980 to expand jurisdiction to acquisitions in which both the acquiring and the acquired companies are "engaged in commerce or in any activity affecting commerce." Pub.L.No. 96-349, §6(a), 94 Stat. 1157. Section 6(b) of Pub.L.No. 96-349 limited application of the amendment to acquisitions made after September 12, 1980.

In *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975), the Supreme Court held that the Clayton Act, unlike the Sherman Act, does not reach companies engaged in purely intrastate activities even though there may be a substantial effect on interstate commerce. Langenderfer relies on *Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871, 872 (5th Cir.), *cert. denied*, 379 U.S. 900 (1964), for the rule that "contractors engaged in the construction of interstate highways and other facilities of interstate commerce are engaged 'in commerce.'" That "rule" is no longer valid, however, in light of *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). In *Copp Paving*, the Court reviewed the uniquely localized nature of asphalt hot-mix markets and held that intrastate sales of asphalt for use on interstate highways was not alone sufficient to establish jurisdiction under the Clayton Act.

With the exception of Union Quarries Co., there is no evidence in the record that any of the acquired companies were directly engaged in interstate commerce. Langenderfer apparently chose to rely solely on the interstate highway nexus, as did the district court. As noted above, this was clear error under *American Building Maintenance* and *Copp Paving*. Based on the evidence presented at trial, the district court erred by granting a directed verdict in favor of Langenderfer, and by denying a directed verdict for Johnson Companies on the Clayton Act cause of action as to all of the acquisitions except Union Quarries Co.

Because of errors on the issues of Clayton Act jurisdiction and predatory pricing we conclude that we must vacate the judgment below. Consequently, we find it unnecessary to address appellants' arguments regarding the scope of damages allowed, and we express no opinion about the possible merits of those arguments.

DIVESTITURE

On cross appeal Langenderfer contends the trial court erred by refusing to order divestiture of Union Quarries, Tri-State Sand & Gravel, two of Johnson's six quarries, and four of Johnson's twelve hot-mix plants. The district court held that the drastic remedy of divestiture was not necessary to restore competition. The court also doubted its authority to grant divestiture in favor of a private plaintiff under Section 16 of the Clayton Act.

Langenderfer correctly observes that Section 16 injunctive relief has three primary purposes: "(1) putting an end to illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the marketplace." *In re Multidistrict Vehicle Air Pollution,* 538 F.2d 231, 234 (9th Cir. 1976) (citing *Schine Chain Theatres, Inc. v. United States,* 334 U.S. 110, 128-29 (1948)). We cannot, however, agree with Langenderfer's claim that the trial court's injunction against future acquisitions and anticompetitive acts only furthers the first of these purposes. Assuming culpability on the part of Johnson Companies, we believe the district court's injunction not only would deprive them of the primary benefits of their past [1060] conduct—continued growth through acquisitions and guaranteed market dominance for the future—but also would serve to bring about a greater degree of competition by eliminating the barriers allegedly erected. In any event, the fact that the remedy fashioned by the district court may have served certain purposes to a lesser extent than others provides no ground for assignment of error.

The more fundamental flaw in Langenderfer's argument is the proposition that divestiture is an available remedy in a suit instituted by a private plaintiff. Although

several district courts have suggested that the remedy should be available, no court of appeals has so held. We find compelling the Ninth Circuit's decision, based on the legislative history of Section 16, that the statute does not create a private divestiture remedy. *I.T. & T. Corp. v. G.T.E. Corp.*, 518 F.2d 913, 920-24 (9th Cir. 1975). *See also, Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692-94 (9th Cir. 1976); *Continental Securities Co. v. Michigan Central Ry. Co.*, 16 F.2d 378, 379-80 (6th Cir. 1926).

PERMISSIVE INTERVENTION

MacRitchie Materials Co., a quarry operator and sister company of Langenderfer, filed a post-trial motion for permissive intervention in the injunctive relief hearings pursuant to Fed.R.Civ.P. 24(b). MacRitchie argued that it had an interest in the injunction proceedings because its own business interests were affected by Johnson's monopolistic practices. The district court found that MacRitchie's claims did not present sufficiently common questions of law and fact as had been addressed during trial and, accordingly, denied the motion. Claiming error, MacRitchie has cross-appealed the trial court ruling.

"[T]he denial of permissive intervention should be reversed only for clear abuse of discretion." *FMC Corp. v. Keizer Equipment Co.*, 433 F.2d 654, 656 (6th Cir. 1970); *Brewer v. Republic Steel Corp.*, 513 F.2d 1222 (6th Cir. 1975). We find no abuse of discretion in this case. The trial below focused on the impact of Johnson's practices on a particular competitor in the asphalt paving market. MacRitchie, a different competitor in a different product market, cannot now complain about the denial of a post-trial motion filed four years after commencement of this action.

For the reasons set forth above, the judgment of the district court is VACATED and this case is REMANDED for retrial.

WILHOIT, *District Judge,* dissenting. I respectfully dissent from the Court's view that as a matter of law, Sherman Act liability on the basis of predatory pricing cannot be proven without some evidence that a defendant has charged prices below its average *total* cost. This circuit has previously taken the view that evidence of intent to predatorily price can be proven either by direct evidence (subjective proof) or by indirect evidence, through analysis, of whether a defendant was pricing above or below average variable cost (objective proof). The latter analysis provides a surrogate measurement for marginal cost at output levels at or near a firm's optimal level of production. *See D.E. Rogers Associates, Inc. v. Gardner-Denver Co.,* 718 F.2d 1431 (6th Cir. 1983); *Richter Concrete Corp. v. Hilltop Concrete Corp.,* 691 F.2d 818 (6th Cir. 1982); *Borden, Inc. v. Federal Trade Commission,* 674 F.2d 498 (6th Cir. 1982).[1]

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1. As the Court notes in its opinion, this Circuit has recently adopted the Ninth Circuit's modified "Areeda/Turner" rule. *See ante* at 10 [A10]. Areeda and Turner first propounded a most influential discussion of how a determination of average variable costs can fairly approximate marginal cost at output levels at or near a firm's optimal level of output. That level, of course, is where a firm is producing at its minimum average costs. Areeda & Turner, *Predatory Pricing & Related Practices Under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975).

D. E. Rogers, 718 F.2d 1431, the case in which this circuit adopted the modified "Areeda/Turner" rule, makes no mention of what the rule should be in situations where, as here, the defendant was pricing at a level above average *total* cost. Areeda and Turner would presume such to be legal. The majority today agrees. I do not, however, because I believe evidence of intent in circumstances such as presented in this case should play a substantial role in determining whether predatory pricing has occurred.

[1061] The Court takes a different approach today. It says, in effect, that irrespective of any direct evidence of intent to predatorily price, if a defendant can prove objectively that his prices were above his average total costs, his conduct is *per se* legal. This gives me pause. What the Court seems to do is to create a "free zone" in which monopolists can exploit their power without fear of Sherman Act scrutiny or sanctions. *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1387 (9th Cir. 1983).

The fact is that the question of proving average variable and fixed costs can be most difficult. Indeed, another panel of this court recently confronted a perfect example of just how hard it is to allocate "costs" in antitrust cases. *See D.E. Rogers*, 718 F.2d at 1435. In that case there was a great deal of argument as to what should be included in the average cost figures. Due to the inherent uncertainty and imprecision in determining "cost," I am persuaded by the view expressed by the Ninth Circuit Court of Appeals in that it is simply unwise to create a *per se* legal zone of predatory pricing irrespective of other conduct and circumstances. *See Transamerica*, 698 F.2d at 1387. To do so simply encourages litigants to skewer their accounting data to be above or below average *total* cost.

Beyond these practical problems of proof, the record in this case convinces me that Johnson was found to be guilty of monopolistic practices, including predatory pricing. The evidence is clear that Johnson specifically intended to drive Langenderfer out of business. Moreover, Johnson's rapid and numerous vertical as well as horizontal acquisitions documents well that it had the power to carry out this intent.

The alleged predatory pricing in this case was nothing more than a manifestation of Johnson's monopoly power. The majority readily admits that Johnson had "attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors." *Ante* at 13. It is clear, therefore, that Johnson possessed substantial market power over its competitors, market power which when coupled with the evidence of Johnson's increasing market share (from 46.9% to 75.8%) indicates it undoubtedly possessed *monopoly* power.

Because Johnson possessed monopoly power, the only other issue for purposes of determining § 2 Sherman Act liability is whether Johnson acquired or maintained that power willfully and intentionally as opposed to mere growth due to a superior product or business acumen. *See United States v. Grinnell Corp.*, 384 U.S. 563 (1966). In this case, I believe that Johnson willfully and intentionally used its inordinate market power to acquire and maintain a monopoly. Direct evidence of its intent substantiates this. But more importantly, Johnson's conduct establishes it in my mind beyond all doubt.

In an industry such as involved here, entrance barriers are unusually high. Start-up costs are enormous. Moreover, Johnson raised these entrance barriers even higher by its many vertical acquisitions. Competitors and potential competitors were discouraged from competing with Johnson because they had to get their supplies from Johnson.

In addition, because of Johnson's ability to operate at lower costs, a perfect climate existed for Johnson to predate. Johnson was able to bid paving contracts at price levels above its average total costs but low

enough to drive competitors out of the market and discourage potential competitors from entering. This practice has sometimes been called "limit pricing" and the fear that a monopolist might undertake it was what probably inspired the Ninth Circuit in *Transamerica.*[2]

[1062] The majority lays aside the many circumstances raised in this case and focuses instead on the pristine economic view that pricing at or above average *total* cost is what competition is supposed to effect.

Unfortunately, the real world is not as it is always assumed in economics. If predatory pricing were the only allegation made in this case and there were no other evidences of monopoly power or monopolistic conduct and intent, I would agree with the majority. Predatory pricing cannot and should not be a competitor's complaint absent an abundance of evidence suggesting the alleged predator not only has the intent to predate, but also the ready ability, as in this case, to carry predation out. Cf. *Transamerica*, 698 F.2d at 1388.[3]

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2. In *Transamerica,* 698 F.2d at 1387, the Ninth Circuit discusses how, in an industry where a substantial initial investment is required, a monopolist could predate with a pricing strategy that is above average *total* cost but below the profit maximizing price of competitors or potential competitors. This strategy is labeled "limit pricing", and appears to be the type of strategy employed by Johnson here.

3. The *Transamerica* case's so-called "extension," *see ante* at 10, of *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 459 U.S. 825, 103 S.Ct. 58 (1982), which the majority today refuses to follow, is the natural outgrowth of the *Inglis case.* The Ninth Circuit has consistently indicated, even prior to *Inglis,* that given the right set of facts concerning a defendant's motive and conduct, it might very well hold a limit pricing strategy impermissible. *See California Computer Product, Inc. v. IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358 n.5 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977).

(Continued on following page)

Nonetheless, as pointed out, I am firmly convinced by the record at hand that Johnson possessed monopoly power and that it used predatory pricing in the form of "limit pricing," among other things such as restrictive contracts and acquisitions, to maintain that monopoly power.

For instance, the majority opinion seems to dismiss the testimony of Howard Shank, Johnson's Vice-President, as mattering little. *See ante* at 8 n.10 [A9]. The Court's view of Shank's testimony might be correct in other circumstances but on the facts of this case, it overlooks the extent of Johnson's vertical integration. The Court states that "[i]t matters little that Johnson might have employed a below-cost figure for gravel or any other item so long as the final bid exceeded the company's *total projected costs.*" *Id.* (emphasis in original).

This overlooks the fact that Johnson was probably the only supplier of gravel in the relevant region. It

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Footnote continued—

The *Transamerica* case takes the *Inglis* rule the next logical step and adopts a reasonable view of how to treat an alleged predator's prices that are above its average total cost. It allocates a heavy burden upon the plaintiff to prove by clear and convincing evidence, that the defendant was predatorily pricing. *Transmerica,* 698 F.2d at 1388. At the same time, however, it does not allow a monopolist, such as Johnson in this case, to escape liability on the basis of predatory pricing merely because it did not price below its average total cost.

The *D. E. Rogers,* 718 F.2d 1436, case in this circuit likewise suggests that the Sixth Circuit would not permit a limit pricing scheme at or above average total cost upon a strong showing of motive and/or other monopolistic conduct. While *D. E. Rogers* does not directly present the issue decided today, it does indicate just as *Transmerica's* predecessors that "direct evidence bearing on the issue of [a defendant's] motive" is an important consideration. *Id.* at 1437 (slip op. at 10). Indeed, only because of the absence of, or ambiguous nature of, such direct evidence was a cost-based analysis even resorted to in that case. *See id.* at 1435 (slip op. at 6).

supplied both its own needs and that of its competitors. Johnson could, therefore, raise the price of gravel to its competitors and thereby subsidize sales of gravel to itself. These below-cost *line* items may very well be a significant indicator of how Johnson was able to keep its "average total cost" figures so low. Having convinced the court that its "costs" were low, indeed lower than its final bid, Johnson has all but successfully defended this action for under the rule announced today, skillful juggling of cost figures has put appellant in the *per se* legal zone, i.e., pricing above average total costs.

I, therefore, respectfully dissent from the majority's view. I think Johnson possessed monopoly power and intended, as evidenced by its conduct, to maintain that power in contravention of Section 2 of the Sherman Act. I would therefore affirm [1063] the district court and remand this case only with respect to the question of remedy.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT DENYING JUDGMENT N.O.V. OR A NEW TRIAL

(Filed September 29, 1980)

Case No. C 76-425

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

vs.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

OPINION AND ORDER

YOUNG, J.:

This cause came to be heard upon the filing by defendants of a motion for a new trial and a motion for judgment notwithstanding the verdict. These motions have been opposed by plaintiffs.

This is a private antitrust action brought by the Arthur S. Langenderfer Company (Langenderfer) against the S. E. Johnson Company (S. E. Johnson) and other affiliated entities. Plaintiff is an asphalt paving contractor which formerly bid paving projects in northwest Ohio for the Ohio Turnpike Commission (OTC) and for the Ohio Department of Transportation (ODOT). The complaint alleges that the defendants S. E. Johnson and its numerous

subsidiaries unreasonably restrained trade and monopolized, attempted and conspired to monopolize the asphalt paving industry in northwest Ohio in OTC and ODOT work in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, and of Section 7 of the Clayton Act, 15 U.S.C. §18. Plaintiff alleges that the anticompetitive practices of the defendants, including, *inter alia,* predatory bidding and the outright acquisition of several competitors, caused the plaintiffs to be driven out of the business of bidding on ODOT and OTC paving contracts in a thirteen county area of northwest Ohio.

This case was tried to a twelve member jury, in a trial commencing on March 3, 1980. On April 2, 1980, the jury returned a unanimous verdict in favor of plaintiffs in the amount of $982,117.00. In an order filed simultaneously herewith, this Court trebled the actual damages and entered a judgment of $2,946,351.00.

Defendants now move for a new trial and for judgment notwithstanding the verdict, raising several grounds. The Court will consider each of the grounds separately herein.

First, defendants urge that plaintiffs' claims under the Sherman Act should be dismissed as a matter of law for the reason that no evidence of monopoly power of the defendants was adduced at trial. Monopoly power is typically defined as the power to control prices or exclude competition in a specific market. *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956); *United States v. Grinnell Corp.,* 384 U.S. 563, 571 (1966). Whether monopoly power exists for the purposes of Section 2 of the Sherman Act requires first a determination of the market within which it is to be measured and of defendant's share of that market. Antitrust law is clear

that no specific market share will result in a prohibited monopoly. The result depends on the facts of each particular case. The identification of a market and the calculation of the defendant's share in that market are primarily questions of fact for the jury to decide. *See e.g. Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 82 n.18 (3d Cir. 1977). It is also a jury question whether the defendant had the power to control market prices or exclude competition within that market.

In the present case, the jury was properly instructed on the definition of the relevant markets and on the elements necessary to establish a monopoly in violation of the Sherman Act. The jury rendered its decision based on a month-long trial, after hearing the testimony of many witnesses and after scrutinizing voluminous exhibits. Plaintiff introduced evidence which showed defendants' large market shares of ODOT and OTC projects let in northwest Ohio, defendants' numerous acquisitions of competing paving contractors and stone and sand pits and several other episodes of alleged anti-competitive practices. This evidence was clearly sufficient to raise a question of fact for the jury as to the existence of monopoly power, a question on which reasonable minds could have reached different conclusions.

Further, it was not necessary for plaintiffs to show actual monopolization under §2 of the Sherman Act. It was sufficient for them to show attempt or conspiracy to monopolize. While these latter violations of §2 do not require actual achievement of monopoly power, they require a specific intent to control market prices or eliminate competition, along with other evidence of predatory conduct.

The trial transcript is replete with evidence from which the jury could have concluded that the defendants

had the specific intent to monopolize. The testimony included statements made by J. T. Kirkby to competitors, wherein Kirkby threatened to run one competitor out of business and warned another not to bid S. E. Johnson's state work. Plaintiffs' experts testified as to the predatory nature of defendants' bidding practices. Also, defendants' market shares of ODOT and OTC work demonstrate that defendants were, at least, close to achieving monopoly power in bidding ODOT and OTC project. There was sufficient evidence from which reasonable minds could find the elements of attempt or conspiracy to monopolize under §2 of the Sherman Act.

As a second reason in support of its motion, defendants contend that plaintiffs failed to establish that defendant's anticompetitive practices were the proximate cause of Langenderfer's demise as an asphalt paving contractor. Defendants urge that plaintiff's downfall was caused, in part, by a declining market for ODOT and OTC work. At trial, defendants also cited many other factors which could affect the profitability of a company. Defendants suggested to the jury that plaintiff's own inefficiency, rather than the bidding practices of the defendants, caused injury to the plaintiffs.

The question of causation of plaintiff's injuries is a question of fact for the jury to resolve. *Costner v. Blount Nat'l. Bank of Maryville, Tennessee,* 578 F. 2d 1192, 1195 (6th Cir. 1978). Defendants made many of these same causation arguments to the jury during closing arguments. Upon considering all the evidence, the jury resolved the causation question in favor of the plaintiffs under proper instructions.

In ruling on a motion for judgment notwithstanding the verdict, the Court may not undertake to weigh the

evidence nor substitute its judgment for that of the jury. Rather, the Court must view all the evidence in the light most favorable to the party who secured the jury verdict, drawing from that evidence all reasonable inferences in his favor. *Morelock v. NCR Corp.*, 586 F. 2d 1096, 1104-05 (6th Cir. 1978) (and the authorities cited therein). A court should grant a motion for judgment N.O.V. only if the evidence is so overwhelmingly preponderant in favor of the movant as to admit of no other reasonable conclusion. *See* 5A *Moore's Federal Practice* ¶50.07[2]. With this proper standard of review in mind, this Court must conclude that these evidentiary questions now raised by defendants regarding monopolization, attempted monopolization, conspiracy and causation must be resolved in favor of plaintiffs in ruling on the present motions.

A similar result is required in connection with defendants' contention that the jury awarded several types of damages which were impermissible. Defendants urge that the jury's award of damages was invalid because 1) the damages included losses not related to the relevant market; 2) the base period selected (1968-1970) was not a proper reference because market conditions have changed since that time; 3) the use of state-wide averages was improper; and 4) the four-year statute of limitations of the Clayton Act, 15 U.S.C. ¶15(b) bars any recovery for damages suffered by plaintiffs prior to August 26, 1972.

This Court finds that all of these arguments attacking plaintiffs' damage claims were made to the jury during closing arguments. Defendants also introduced evidence during trial in an effort to show that present market conditions differed from those of the base period and that plaintiffs' damage requests included losses outside the relevant market. These questions regarding damages are factual questions which were resolved by the jury, who

were instructed on the proper measure of damages and cautioned against awarding speculative damages.

As an additional ground in support of its motions, defendants contend there was no evidence of an unreasonable restraint of trade under §1 of the Sherman Act. Defendants assert that plaintiffs' case rested chiefly on the alleged predatory bidding practices of the defendants. Defendants contend that their bidding practices were not unlawful under the antitrust laws since the evidence showed that the defendants' bids on ODOT and OTC projects were always above their own costs and that they were consistently making a profit at their bid prices. Defendants cite numerous cases which have held that predatory pricing or bidding can be found only where the alleged predator is bidding below its own average variable costs. *See the discussion in Pacific Engineering Co. v. Kerr-McGee Corp.*, 551 F. 2d 790, 795-97 (10th Cir. 1977), *cert. denied*, 434 U.S. 879 (1977).

In response, plaintiffs cite recent cases which purportedly have formulated definitions of predatory pricing which do not rely strictly upon price/cost relationships. These cases hold that bidding above one's own costs may still be found to be predatory if there is also direct proof of specific intent to exclude competition or proof of a dangerous probability of success. *See Transamerica Computer Co. v. International Business Machines Corp.*, 1979-2 Trade Cases ¶62,989 (N.D. Cal. 1979); *Hanson v. Shell Oil Co.*, 541 F. 2d 1352, 1358 n. 5 (9th Cir. 1976); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F. 2d 714, 723 (5th Cir. 1975).

Courts and scholars have not clearly delineated what practices should constitute unlawful predatory pricing. It suffices to say that no simple mechanical rule using price/

cost relationships has developed. Whichever test is followed, a usual earmark of predatory pricing is "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 698-99 (1975).

This Court recognizes the difficulties in formulating a legal definition of predatory pricing. Legally and factually, there is a fine line between competitive pricing and predatory conduct. In this case, the Court felt it was appropriate to let the jury decide where that line was to be drawn. With the combined background of their human experiences, a jury has the unique ability to resolve such factual questions, to sense an anti-competitive animus, and to recognize predatory conduct.

Defendants move to dismiss the claims against several of the corporate defendants on the ground that the evidence showed no direct individual participation by each of the defendants in the unlawful activities. This Court agrees with plaintiffs that these defendants should not be released from liability merely because they played a lesser role in the alleged antitrust violations. All the defendants are under the common ownership and control of the principal defendant, S. E. Johnson. Upon consideration of all the evidence in this case, this Court finds no compelling reason to impose separate liability on selected defendants.

Defendants move to dismiss the antitrust claims against the individual defendant J. T. Kirkby for the reason that the liability of an officer of a corporation under the antitrust laws is limited to instances of personal

participation in inherently wrongful conduct. Plaintiffs respond by citing evidence of defendant Kirkby's personal participation in defendants' anticompetitive practices. In their opposition to defendants' motions, plaintiffs state emphatically:

> "Taking the individual defendant Kirkby by himself, it is evident that he was the architect of the master plan: he engineered and negotiated the illegal acquisitions; he established or approved the monopolistic or discriminatory stone and hot mix prices; he personally supervised and priced the predatory bidding; he personally threatened to run Gills out of business and told Sader not to bid Johnson's state work; he was the one who decided to bid unreasonably low to exclude competition; the combination would not have worked without him. Even using defendants' own case authority, defendant Kirkby was up to his eyeballs both in implementing and knowing approval of 'inherently wrongful conduct.' If any defendant is liable for *all* the defendants' illegal acts, John T. Kirkby is."

This Court finds that there was sufficient evidence adduced at trial to convince a reasonable juror that defendant Kirkby personally participated in a wide range of anticompetitive practices.

Finally, this Court finds that the statute of limitations defense raised in defendants' motion for judgment N.O.V. is not well taken. The jury was fully instructed on the statute of limitations defense and on the fraudulent concealment issue involved therein. This Court is unwilling to disturb their findings in that regard.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that defendants' motion for a new trial and motion for judgment notwithstanding the verdict be, and the same hereby is, OVERRULED.

IT IS SO ORDERED.

/s/ DON J. YOUNG
Sr. United States District Judge

JUDGMENT FOR INJUNCTIVE RELIEF OF THE UNITED STATES DISTRICT COURT

(Filed January 27, 1981)

Case No. C 76-425

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs,

VS.

S. E. JOHNSON COMPANY, *et al.*,
Defendants.

This cause came to be heard upon the filing by plaintiff of an application for injunctive and other remedial relief. This motion has been opposed by defendants.

This is a private antitrust action brought by the Arthur S. Langenderfer Company (Langenderfer) and the Northern Ohio Asphalt Paving Co. (NOAP) against the S. E. Johnson Company (S. E. Johnson) and other affiliated entities. Plaintiff is an asphalt paving contractor which formerly bid paving projects in northwestern Ohio for the Ohio Turnpike Commission (OTC) and for the Ohio Department of Transportation (ODOT). The complaint alleged that the defendants S. E. Johnson and its numerous subsidiaries unreasonably restrained trade and monopolized, attempted and conspired to monopolize the asphalt paving industry in northwestern Ohio in OTC and ODOT work in

violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, and of Section 7 of the Clayton Act, 15 U.S.C. §18. Plaintiff alleged that the anticompetitive practices of the defendants, including, *inter alia,* predatory bidding and the outright acquisition of several competitors, caused the plaintiffs to be driven out of the business of bidding on ODOT and OTC paving contracts in a thirteen county area of northwestern Ohio.

This case was tried to a twelve member jury, in a trial commencing on March 3, 1980. On April 2, 1980, the jury returned a unanimous verdict in favor of plaintiffs in the amount of $982,117.00. This Court trebled the actual damages and entered a judgment of $2,946,351.00.

Section 16 of the Clayton Act, 15 U.S.C. §26, gives a private party the right to seek injunctive relief in an antitrust action. Section 16 provides that:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . ."

15 U.S.C. §26. The purpose of this provision is not merely to provide private relief, "but also to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969). The propriety of granting injunctive relief in a private antitrust action is to be determined by using traditional principles of equity conditioned by the necessities of the public interest. However, the plaintiff must demon-

strate a "significant threat of injury" to the plaintiff from an impending violation of the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra* at 130.

In their opposition, defendants contend that there has been no showing of any "threatened injury" to the plaintiff due to the fact that plaintiff is currently in the process of liquidating its corporate assets. Specifically, defendants point out that effective June 23, 1980 plaintiff sold its two remaining asphalt plants to the Miller Brothers Paving Company, a competitor of the defendants. It appears that the plaintiff has retained its quarry at West Millgrove, Ohio in order to supply Miller Brothers and others with their stone requirements. Affidavit of Burton R. MacRitchie. Defendants further state that the only remaining asset of the plaintiffs is the real property where the corporate offices are located on Bancroft Street in Toledo, Ohio, which is currently listed for sale through a local real estate company.

By an order dated October 16, 1980, this Court ordered that a hearing be held on the issues of standing and "threatened injury" to the plaintiffs in the future as a result of the continued anticompetitive practices of the defendants. In that order, this Court stated that the "[t]he evidence adduced at such hearing should address only those considerations peculiar to the equitable relief, and the parties should not attempt to relitigate the matters resolved by the jury. *See Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Assn.*, 371 F. 2d 263, 270-71 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967.)"

A one day injunction hearing was held on January 8, 1981. The Court is now in a position to address the factual issue of "threatened injury" to the plaintiffs and to rule on plaintiffs' application for injunctive relief.

As the Court indicated at the outset of the injunction hearing, the important question is not technically one of plaintiffs' standing to seek relief. The evidence adduced at the trial on the merits showed to the jury's satisfaction that the anticompetitive practices of the defendants resulted in extensive actual injuries to the plaintiffs' asphalt paving business. Under these circumstances, plaintiffs clearly have standing to seek relief under the antitrust laws.

Rather, the important question is whether the plaintiffs are entitled to specific types of equitable relief. In order to establish a right to equitable relief under 15 U.S.C. §26, a plaintiff must demonstrate a "significant threat of injury" to the plaintiff in the future from an impending violation of the antitrust laws. In determining whether there exists such threatened injury, probative facts would include plaintiffs' status as a present competitor and their intentions with respect to re-entry into the asphalt paving market.

The evidence adduced at the injunction hearing clearly showed that the plaintiffs have not completely terminated their activities in the asphalt paving industry in the thirteen county area of northwestern Ohio. The evidence showed that the plaintiffs are maintaining a level of residual business in the industry which is threatened by the continued anticompetitive practices of the defendants. For example, Burton MacRitchie testified that the plaintiffs have entered into certain arrangements with the Miller Brothers Paving Company. Plaintiff NOAP is currently acting as an independent contractor selling asphalt for the Miller Brothers, a competitor of the defendants.

The evidence also showed that Langenderfer today is bidding limited ODOT work and other private work on a

small scale. Langenderfer began bidding again in the spring of 1980. On July 7, 1980, Langenderfer qualified to bid small state jobs under a new ODOT program for small businesses. Injunctive Hearing Exhibits 4, 5. Under the certificate, plaintiffs are permitted to bid on ODOT contracts up to $150,000. The evidence further showed that Langenderfer won one job in Fulton County during the summer of 1980.[1]

Burton MacRitchie further testified that plaintiffs have bid on county and municipal contracts but have won none of these to date. The plaintiffs' companies have also submitted various price quotations to work with other contractors.

Burton and Ronald MacRitchie both testified that plaintiffs have no intention of going out of the asphalt paving business. The MacRitchies testified that they liquidated many of their assets to pay outstanding debts and to improve the company's financial situation. The testimony showed that the plaintiffs' present plans are to reacquire assets and to develop Langenderfer into a full fledged contractor in the asphalt paving business as market conditions change and the financial picture of the plaintiffs continues to improve.

Upon consideration of all the testimony and exhibits produced at the January 8, 1981 hearing, this Court finds that the plaintiffs have demonstrated that the defendants' continued activities threaten injury to the plaintiffs status as a potential competitor as well as to plaintiffs' residual

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1. Much of the work on this contract was performed by the Miller Brothers pursuant to a subcontract. Burton MacRitchie testified that the present plans of the plaintiffs are to do private work and smaller ODOT contracts, subcontracting some of the work to other paving contractors until plaintiffs' own financial condition allows it to repurchase some of its liquidated assets.

business in the asphalt paving industry. Under these circumstances, this Court finds that injunctive relief is proper under 15 U.S.C. §26. *Zenith Radio Corp. v. Hazeltine Research Inc., supra* at 130. This Court must now determine the types and scope of injunctive relief which it feels will effectively protect the plaintiffs from this "threatened injury" and promote the interest of free competition in the ODOT and OTC market in northwestern Ohio.

Plaintiffs request several types of injunctive relief. Plaintiffs seek to restrain the defendants from engaging in various anticompetitive practices including among others, the following: acquiring any limestone quarries, sand or gravel pits, asphalt plants, asphalt paving companies or bridge building companies within the next ten years without prior court approval; charging discriminatory prices; refusing to sell stone or sand to plaintiff; tying sales of asphaltic concrete to purchases of stone or sand; intimidating, threatening or discouraging competitors from expanding their businesses or bidding on highway construction projects; and bidding below defendants' costs. In addition, plaintiffs seek an order requiring the defendants to divest themselves from all interest in or control of the Union Quarries Company, the Tri-State Sand and Gravel Company, and various limestone quarries and hot mix asphaltic concrete plants.

This Court finds that, at a minimum, plaintiffs are entitled to an injunction which would prevent defendants from a continuation of those anticompetitive practices clearly shown by the evidence at the March, 1980 trial on the merits.

At trial, plaintiffs introduced evidence which showed defendants' large market shares of ODOT and OTC projects

in northwestern Ohio. For example, the evidence showed that defendants' combined market share of ODOT and OTC projects grew on the average from 46.9% for the 1966-71 period to 63.3% for the 1972-78 period (Plaintiffs Exhibit 73); that defendants produced on the average 40% of all asphalt tonnage produced in northwest Ohio by ODOT-qualified plants, their closest competitor being at 15% (Plaintiffs Exhibits 29, 30); that defendants obtained 75.8% of all turnpike work let from 1970-78 (Plaintiffs Exhibit 69A). This market position was acquired, at least in part, through a series of acquisitions by defendants of their competitors, including the facilities of the Price Companies (1969), Ohio Engineering (1970), C. R. Creager & Sons (1971), Northwest Materials (1972), and the Union Quarries Company (1976) (sic). Defendants' market shares were also a result of their superior vertical integration, i.e. their ownership of stone and sand pits, which enabled the defendants to bid low on asphalt paving work while charging higher prices to competitors for raw materials.

This Court finds that future similar acquisitions by the defendants may threaten injury to the plaintiffs. In the interests of free competition and to remedy the defendants' continuing violations of the antitrust laws, this Court believes careful scrutiny of any future acquisitions by the defendants is necessary. Thus, this Court will order that the defendants be enjoined from acquiring any limestone quarries, sand or gravel pits, asphalt plants, or other paving companies within the next ten (10) years without the prior approval of this Court.

Another injunction fully warranted by the evidence adduced at trial is a prohibition against the defendants' practice of intimidating, threatening or discouraging plaintiffs or other competitors from building their own asphalt

plants or from bidding certain kinds of state work. At trial, Joseph Gill testified that defendants' officers, J. T. Kirkby and Robert Johnson, threatened to run his company (Gill Asphalt and Cement Company) and other competitors out of business. Transcript pp. 599-607. This conversation included a statement by Mr. Kirkby that he had a "big argument with Art Langenderfer and he didn't like him and would like to run him out of business." Transcript p. 606. Similarly, Mr. Gregory Sader testified that, on one occasion, defendants' officers warned his company (G. M. Sader Excavating and Paving, Inc.) not to bid Johnson's state work. Transcript pp. 789-91. This Court feels that these types of threats are sufficient to warrant an injunction against any similar types of threats and intimidation by defendants in the future.

Finally, this Court feels that the evidence at trial justifies some injunctive relief in connection with the bidding practices of the defendants. The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects. At trial, plaintiffs vigorously attempted to show how defendants deliberately excluded competition by bidding low and deliberately sacrificing short term profits for the purpose of driving rivals out of business.

While plaintiffs' evidence at trial showed that the defendants' bids were often below plaintiffs' costs, any evidence of defendants' bids below its *own* costs was scarce. There was some testimony by Howard A. Shank, defendants' Vice President and chief estimator, that he bid below cost and overhead only on specific items in preparing a bid on OTC and ODOT projects. Transcript pp. 648-710. Nonetheless, this Court feels that it would appropriate to

include an order prohibiting defendants from bidding below their own costs on ODOT and OTC projects.[2]

Plaintiffs request injunctions against certain anticompetitive practices of the defendants which were not specifically proven by evidence at trial. For example, plaintiffs seek prohibitions against the defendants' alleged practices of charging discriminatory stone prices, refusing to sell stone or sand to plaintiffs, and tying sales of asphaltic concrete to purchases of stone or sand.

As a general rule, this Court has authority under 15 U.S.C. §26 to enjoin continuing anticompetitive practices of the defendants which were proven at trial to be a violation of the antitrust laws. In addition, several cases from the Supreme Court have held that an injunction in a federal antitrust case may permissibly reach acts other than those specifically found to be violations of the antitrust laws, and that acts related or incident to the proven violations may be enjoined. See e.g., *International Salt Co. v. United States*, 332 U.S. 392 (1947); Annot., "Propriety and Scope of Injunctive Relief in Federal Antitrust Case," 55 L. Ed. 2d 892, 911-12 (1978). Specifically, the Supreme Court has stated:

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2. The Court will limit its injunctive relief to prohibiting defendants from bidding below its *own* costs for two reasons. First, such an order avoids the necessity of deciding which definition of predatory pricing this Court should accept. *See* this Court's Opinion and Order of September 29, 1980 (and the recent case authorities on this issue therein). All courts would agree that the practice of bidding below one's own costs in order to exclude competition would constitute illegal predatory conduct.

Second, this Court is hesitant to issue a broader injunction which would, for example, prohibit defendants from "leaving money on the table" (i.e. undercutting competitors' bids) while bidding on ODOT and OTC projects. Such an order would require that the defendants have some knowledge of its competitors' costs and bids, thus leading the defendants into other types of potentially suspect practices.

> "Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, however unrelated to the violation found by the court, *e.g., New York, N. H. & H. R. Co. v. ICC,* 200 U.S. 361, 401 (1906), '[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.' *International Salt Co. v. United States,* 332 U.S. 392, 400 (1947)."

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 133.

In the present case, this Court finds that the *International Salt* line of cases justifies the issuance of injunctions in the areas of price discrimination, refusals to deal, and tying arrangements in the asphalt paving industry in northwestern Ohio. There was no hard evidence at trial establishing that defendants had actually engaged in these specific practices. However, the evidence at trial did establish that the defendants possessed strong control over raw material sources (i.e. sand and gravel pits) in northwestern Ohio.[3]

This Court senses, and the evidence at trial implied, that this type of control over raw materials could lead to the types of abusive practices sought to be enjoined by plaintiffs and which are already prohibited by the antitrust laws. Thus, under the doctrine of *International Salt*, this Court finds that it will exercise its equitable powers to prohibit the defendants from engaging in practices of

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3. It was argued by plaintiffs that the monopolistic profits received by the defendants from their stone and sand business supported their low bids on ODOT and OTC paving work.

price discrimination, refusals to deal and tying arrangements.

Next, plaintiffs seek an order requiring the defendants to divest themselves from all interest in or control of the Union Quarries Company, the Tri-State Sand and Gravel Company, various limestone quarries and hot mix asphaltic concrete plants. This Court finds that plaintiffs' request for an order of divestiture is not well taken for two reasons. First, there is considerable doubt about this Court's jurisdiction to order divestiture in a private antitrust case. See *International Telephone and Telegraph Corp. v. General Telephone and Electronics Corp.*, 518 F. 2d 913, 920-25 (9th Cir. 1975); *American Commercial Barge Line Company v. Eastern Gas & Fuel Associates*, 204 F. Supp. 451, 453 (S.D. Ohio 1962). *Contra, NBO Industries Treadway Companies, Inc. v. Brunswick Corp.*, 523 F. 2d 262, 278-79 (3rd Cir. 1975).

Secondly, even if there is authority to order divestiture in a private antitrust suit, this Court finds that such an order is not necessary under the facts of this case. Divestiture is a harsh remedy which should be used only if no other preventative relief will fit the exigencies of the situation. *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780, 797-98 (S.D. Tex. 1971), *aff'd.* 476 F. 2d 989 (5th Cir. 1973). In the present case, this Court concludes that other measures will be effective to protect adequately against the "threatened injury" to plaintiffs. The Court feels that the interest of free competition in the asphalt paving industry in northwestern Ohio will be sufficiently served by the prohibitions already discussed herein, including the injunction prohibiting the defendants from acquiring any further asphalt plants or stone quarries for the next ten (10) years without prior Court approval. These

measures should be sufficient to remove any monopolistic barriers to plaintiffs' re-entry into the asphalt paving market. Thus, this Court is unwilling to order divestiture.[4]

Finally, plaintiffs request that this Court prohibit the defendants from bidding on or supplying materials to any ODOT or OTC contract let in northwestern Ohio for a period of one year or for such longer time as it may take to totally divest themselves of certain assets. Plaintiffs contend that this sanction is necessary in order to "handicap" the defendants until compliance with the Court's other orders. Plaintiffs Application for Injunctive and Other Remedial Relief p. 10. Further, plaintiffs urge that this order would be another way to "'skin the cat' rather than trying to monitor [the defendants'] daily bidding practices." Plaintiffs' Reply Brief p. 6.

This Court feels that the interests of free competition in this market would not be served by these measures designed to "handicap" or punish the defendants. One senses that the other competitors of the defendants who are more involved in the asphalt paving industry than are plaintiffs would have undue advantage in bidding on ODOT and OTC contracts without the presence of the major competitor in the market. This Court is unwilling to impose such

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4. This Court's decision to disallow divestiture is, in part, a result of the current market structure in the asphalt paving industry in northwestern Ohio. Currently, the defendants are faced with only a few major competitors. The evidence shows that at least one of these competitors, Miller Brothers, has experienced remarkable growth since its entry into the asphalt paving market in 1972. It is evident from plaintiffs' proposed divestiture order that any divested companies would end up in the hands of these other competitors. Plaintiffs' Application for Injunctive and Other Remedial Relief p. 3 (the proposed notice provisions). This Court agrees with the defendants that some of the forms of injunctive relief requested by plaintiffs (i.e. an order prohibiting defendants from bidding ODOT and OTC work and an order requiring divestiture) would tend to create a regulated market rather than a free and competitive market.

regulations on the present market and further finds that the public interest would not be served thereby.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED as follows:

I.

As used in this order, the term:

(a) "Person" shall mean any individual, corporation, partnership, firm, association, or other business or legal entity;

(b) "Asphaltic concrete" means a mixture of limestone, sand, liquid asphalt and other additives which in combination form highway construction materials;

(c) "Asphaltic concrete producers" are those persons who operate hot mix plants at which asphaltic concrete is mixed, processed and produced;

(d) "Asphalt paving contractors" are those persons who purchase or obtain asphaltic concrete from hot mix plants and engage in the business of building, laying or applying said products to highways and roads;

(e) "Northwestern Ohio" shall mean that geographical area comprising the thirteen counties of Williams, Defiance, Paulding, Fulton, Henry, Putnam, Lucas, Wood, Hancock, Ottawa, Sandusky, Seneca and Wyandot;

(f) "Toledo Metropolitan area" shall include that area within a thirty mile radius of downtown Toledo.

II.

This order applies to each of the corporate defendants, their officers, directors, agents, employees, shareholders, subsidiaries, successors and assigns, and to the individual defendant, and to all other persons in active concert or participation with any of them who shall have received actual notice of this order by personal service or otherwise.

III.

Each defendant is enjoined and restrained from, directly or indirectly:

(a) acquiring any interest in or control of limestone quarries, sand and/or gravel pits asphaltic concrete hot mix plants, asphaltic concrete producers, asphalt paving contractors, or bridge building contractors within ten (10) years from the date hereof without the prior approval of the Court and upon notice to the plaintiffs;

(b) intimidating, threatening or discouraging plaintiffs, asphaltic concrete producers or asphalt paving contractors in any manner from building their own asphalt plants, or threatening to run them out of business, withhold stone or sand supplies, or bid against them in certain areas in the event they construct asphaltic concrete hot mix plants;

(c) intimidating, threatening or discouraging plaintiffs, or other asphalt paving contractors or competitors from bidding on certain kinds of highway construction work or in certain geographical areas;

(d) pricing or bidding on specific items of state highway (ODOT) or Ohio Turnpike construction work below defendants' cost plus overhead regardless of the

total effect of the bid items or the quantities estimated by the state, the Turnpike or defendants on various projects;

(e) quoting or charging plaintiffs or other asphaltic concrete producers or asphalt paving contractors discriminatory or higher prices for asphaltic concrete, stone or sand than those charged to defendants' asphaltic concrete producers or asphalt paving contractors;

(f) selling stone and sand at higher prices to plaintiffs or other asphaltic concrete producers or asphalt paving contractors located in the Toledo Metropolitan area than those prices at which defendants customarily sell similar products in other areas of northwestern Ohio;

(g) refusing or threatening to refuse to sell stone or sand to plaintiffs, asphaltic concrete producers or asphalt paving contractors when defendants have such products available for sale or transfer to defendant asphaltic concrete producers or asphalt paving contractors;

(h) tying sales of asphaltic concrete in any manner to purchases of stone or sand by customers, or, tying sales of stone and sand to requirements or conditions that customers purchase all or any portion of their asphaltic concrete needs from defendants' facilities;

IV.

Jurisdiction is retained by this Court for the purposes of enabling any of the parties to this order to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction

or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

V.

This order shall terminate ten (10) years from the date of its entry.

IT IS SO ORDERED.

/s/ DON J. YOUNG
Sr. United States District Judge

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 15, 1984)

Nos. 80-3705, 81-3065,
81-3114, 81-3115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC., *et al.*,
Plaintiffs-Appellees, Cross-Appellants,

MACRITCHIE MATERIALS, INC.,
Proposed Intervenor, Appellant, (81-3115)

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants, Cross-Appellees.

JUDGMENT

Before: LIVELY, *Chief Circuit Judge;* WELLFORD, *Circuit Judge;* and WILHOIT, *District Judge.*

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court, that the judgment

of the said District Court in this case be and the same is hereby vacated this case is remanded for retrial.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: July 11, 1984

COSTS: None

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed July 3, 1984)

Nos. 80-3705, 81-3065
81-3114, 81-3115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR S. LANGENDERFER, INC.,
Plaintiffs-Appellees, Cross-Appellants,

v.

S. E. JOHNSON COMPANY, *et al.*,
Defendants-Appellants, Cross-Appellees.

ORDER

Before: LIVELY and WELLFORD, *Circuit Judges;* WILHOIT, *District Judge.**

The court has considered the plaintiff-appellant's motion for an en banc hearing and has rejected the petition for this consideration.

The panel in this case has carefully considered the petition for a rehearing and we conclude that no further action should be taken under all the circumstances. Judge

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*The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

Wilhoit disagrees, and would grant the petition for reasons set forth in his dissenting opinion.

Accordingly, the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

STATUTES AND RULE

Sherman Act

15 U.S.C. §1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both, said punishments, in the discretion of the court.

15 U.S.C. §2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act

15 U.S.C. §18

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and hold-

ing all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

* * * * *

15 U.S.C. §26

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damages by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect to any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of the suit, including a reasonable attorney's fee, to such plaintiff.

Rule 49(b), Federal Rule of Civil Procedure

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.